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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

**JON BEELER**, Petitioner

v.

**JOHN ROUNSAVALL; MARY GAYLE RAMSEY; and THE CITY OF TERRELL, TEXAS**, Respondents

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

# PETITION FOR WRIT OF CERTIORARI

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39 pp

## QUESTIONS PRESENTED

Whether the United States Court of Appeals for the Fifth Circuit erred in determining that illegitimate animus is necessary for a "class-of-one" equal protection or selective enforcement claim and that Appellant was not "similarly situated" or treated differently than individuals that occupied the site of a convenience store once operated by Appellant.

Appellant respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

## LIST OF ALL PARTIES

The persons listed below are all parties to the proceeding in the court whose judgment is sought to be reviewed.

1. **JOHN ROUNSAVALL**

Represented at trial by Melissa M. Fletcher and on appeal by Peter Smith, NICHOLS, JACKSON, DILLARD, HAGER & SMITH, L.L.P., 1800 Lincoln Plaza, 500 North Akard, Dallas, Texas 75201.

2. **MARY GAYLE RAMSEY**

Represented at trial by Melissa M. Fletcher and on appeal by Peter Smith, NICHOLS, JACKSON, DILLARD, HAGER & SMITH, L.L.P., 1800 Lincoln Plaza, 500 North Akard, Dallas, Texas 75201.

3. **THE CITY OF TERRELL, TEXAS**

Represented at trial by Melissa M. Fletcher and on appeal by Peter Smith, NICHOLS, JACKSON, DILLARD, HAGER & SMITH, L.L.P., 1800 Lincoln Plaza, 500 North Akard, Dallas, Texas 75201.

4. **JON BEELER**

Represented at trial and on appeal by Michael P. Wortham, NACOL, WORTHAM & ASSOCIATES, P.C., 990 South Sherman Street, Richardson, Texas 75081.

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***Abbreviations***

"R" refers to the appellate record and the number that follows refers to the page cited in the record.

"TR" refers to the Transcript of Motions (Defendants' motion for summary judgment) Hearing Before the Honorable Barbara M.G. Lynn, United States District Judge, held on February 11, 2002

"R 249" refers to Appellees' Appendix to their motion for summary judgment and consists of pages 1a-1d (table of contents) and pages 1-286 (affidavits and supporting evidence)

"R 297" refers to Appellant's Appendix to his response to the motion for summary judgment and consists of pages 1a-1c (table of contents) and pages 1-56 (affidavits and supporting evidence)

"JB Depo" refers to the Oral Deposition of Jon Beeler

"MGR Depo" refers to the Oral Deposition of Mary Gayle Ramsey

"JR Depo" refers to the Oral Deposition of John Rounsavall

"HR Depo" refers to the Oral Deposition of Humberto Rodriguez

"GL Depo" refers to the Oral Deposition of Grady Lawson

IN THE SUPREME COURT OF THE UNITED STATES

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JON BEELER, Petitioner

v.

JOHN ROUNSAVALL; MARY GAYLE RAMSEY; and THE CITY OF TERRELL, TEXAS, Respondents

---

# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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## OPINIONS BELOW

The opinion of the court of appeals is unreported. The opinion of the district court is unreported.

## JURISDICTION

The Court of Appeals entered its judgment on May 7, 2003 (App., infra 1A-7A). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are as follows: 18 U.S.C. § 2; 21 U.S.C. § 841(a)(1), d; 21 U.S.C. §841(b)(1)(A)(B); 21 U.S.C. § 846.

## STATEMENT OF FACTS

A. Background and Course of Proceedings

From 1990 until approximately March 15, 2000, Appellant Jon Beeler rented real property located at 307 Ninth Street, Terrell, Texas, ("Location A") from Grady Lawson ("Lawson") and operated a convenience store known as Handy Mart at Location A. Appellant sold a variety of food and beverages at the site, including beer and wine and related items, and held a valid Wine and Beer Retailer's Off-Premises Permit. R 250; R 249/57 (JB Depo 11:13-17), 59 (JB Depo 19:2-13), 153 (GL Depo 10:21-25), 155 (GL Depo 20:21-23), 164 (GL Depo 54:608); R 297/1 (JB Aff 2).

In December 1999, Appellant decided to relocate Handy Mart from Location A to 305 Ninth Street, Terrell, Texas ("Location B"). R 249/62 (JB Depo 32:11-23), 63 (JB Depo 33:1-6, 33:16-23), and 35:19 through 36:25); R 251; R 297/4.

On January 6, 2000, Appellant applied for a Wine and Beer Retailer's Off-Premise Permit (hereinafter referred to as "permit") for Location B from the City, the Texas Alcoholic Beverage Commission and Kaufman County. R 297/8-18. Appellant complied with all procedures and approvals necessary for and applicable to said applications and license or permit. The City issued Appellant a "Wine and Beer Retailer's Off-Premise Permit" for Location B on or about January 11, 2000, which confirmed that the City had certified Appellant's application for a permit for Location B. R 249/3-6, 66 (JB Depo 45:20 through 46:7), 100, 115 (JR Depo 51:1-8), 118 (JR Depo 62:14-16); R 251; R 297/2 (JB Aff 5).

In reliance upon the granting of this permit, Appellant purchased the property at Location B for the sum of $100,000 on January 12, 2000. R 249/72 (JB Depo 70:6-15), 283; R 251.

In preparation for the move, on January 4, 1998 and January 29, 1998, Appellant had mailed two letters to Appellee Mary Gayle Ramsey ("Ramsey"), the city attorney for the City of Terrell, Texas,

(R 297/4-7) and placed several telephone calls to Appellee Ramsey in an attempt to ascertain whether it would be possible to obtain a beer and wine permit at Location B. Appellee Ramsey did not respond to the letters or the calls. R 249/79-80 (JB Depo 100:5 through 101:14); R 297/2 (JB Aff 3). Thereafter in 1998, at Appellant's request, Winston Smith ("Smith"), an employee of Appellant, began calling the City in an attempt to determine whether it would be possible to obtain a permit at Location B. R 249/80 (JB Depo 102:3-6). Smith was told by Appellee John Rounsavall ("Rounsavall), city secretary for the City of Terrell, Texas, in early 1998 that the issuance of a permit at Location B would not violate any City ordinances. R 249/79-80 (JB Depo 98:24 through 99:1-5); R 251-252. Rounsavall's statement to Smith coupled with the grant of Appellant's application for a Wine and Beer Retailer's Off-Premise Permit by the City assured him that the City would not oppose his application. R 249/58 (JB Depo 13:18 through 14:15), 66 (JB Depo 46:5 through 50:13); R 252; R 297/2 (JB Aff 6).

In late January 2000, Lawson made numerous trips to Location A and asked Smith various questions about Appellant's move. R 249/158 (GL 31:14-24). Lawson insisted that Appellant would not be able to obtain a permit at Location B and stated that if Appellant tried, he would be "the first one up there to fight it" and that he would "fight it as hard as he can." R 249/62 (JB Depo 30:1-14). In an effort to prevent Appellant from obtaining a permit, Lawson told Appellee Ramsey that "they may be setting theirself up for a lawsuit" because "that building had been turned down before." R 249/159 (GL Depo 33:5-7) Lawson did not want Appellant to have a permit at Location B because he did not want any competition for his Location A right next door. R 249/159-160 (GL Depo 36:13 through 37:3); R 252.

After learning that the City had certified Appellant's permit, Lawson went to the offices of both Rounsavall and Appellee Ramsey to complain of the approval and certification because he wanted his premises, Location A, to be the only seller of beer and wine in the area. R 249/3-6, 109 (JR Depo 28:3-25), 110 (JR Depo 29:6 through 31:1), 115 (JR Depo 51:9-25), 125 (JR Depo 91:16-18), 158 (GL

Depo 31:17 through 32:25), 158-159 (GL 32:4 through 34:17), 160 (GL Depo 40:22:25), 208 (MGR Depo 65:12:21, 232 (MRG Depo 162:7-25, 233 (MGR Depo 163:1-6). Lawson also visited Tim Maloney, local TABC agent in Terrell, and asked him if Appellant had applied for a permit. R 249/158-159 (GL Depo 32:23 through 36:2). Lawson told Rounsavall, Appellee Ramsey and Maloney that Appellant "shouldn't have a license" because he thought Location B "was previously turned down for a license." R 249/158-159. Lawson complained about Appellant's permit because he did not want competition for his building. R 249/158-159 (GL Depo 36:13 through 37:3); R 252-253.

Once Lawson complained of the approval and certification, Appellees began to take action to prevent Appellant from obtaining the permit. R 253.

Rounsavall stated that he determined that the City's certification of Appellant's application for a permit for Location B had been issued in error because he thought that a new address number had been assigned to Location A, which he states occasionally occurs when additional numbers are added to a street. He stated that he took necessary actions to protest Appellant's application "pending a determination of whether selling beer and wine out of location B would be in violation of the City's ordinances" because he was "under the impression that one could not sell beer and wine from Location B." R 249/126 (JR Depo 93:4 through 96:15); R 253.

There is nothing to suggest or lead anyone to believe that Appellant's application for a beer and wine permit was a "change of address." This version of the City's position came to light after the lawsuit was filed as an attempt to justify the Defendants' true intentions. R 253; R 297/20 (MW Aff 2).

Instead of following TABC procedures and protesting the application based upon a valid statute or ordinance, Appellees asked Maloney to hold the application without notification to Appellant. R 249/73 (JB 73:4-8); R 297/2 (JB Aff 7).

On February 8, 2000, Appellant met with Maloney and told him that he wanted to obtain the permit as soon as possible. Maloney told Appellant to deliver him a stamped "overnight" envelope, and he would send the application to Austin that day. Appellant delivered such an envelope to Maloney that day. R 249/72 (JB Depo 72:16-25); R 254.

When he had not received a permit by February 24, 2000, Appellant contacted the service that had filed the application on his behalf and was told that the application had never been forwarded to the TABC in Austin. Appellant then called several state officials and requested help in locating the application. Eventually an employee of Texas State Senator David Cain's office told Appellant that the application was being held up by Appellee Ramsey because of a "proximity issue." R 249/69 (JB Depo 57:9 through 58:2); R 254.

After realizing his permit was being delayed, Appellant visited Appellee Ramsey, Rounsavall and Maloney to determine the reasons for the delay. On March 1, 2000, Rounsavall told Appellant that a school owned an athletic field was near Location B (and Location A) and gave Appellant a copy of a city ordinance. R 249/69-72 (JB Depo 60:1 through 67:3); R 254.

Appellant next visited Maloney, who said the City had told him to hold the application. Maloney would not tell Appellant who called him or when they called. R 249/73 (JB Depo 73:4-11), 74 (JB Depo 77:16-20); R 255.

Appellant made an appointment to see the city manager but the city manager canceled the meeting and told Appellant to discuss the issue with Appellee Ramsey. R 249/70 (JB Depo 62:11-22); R 255.

Appellant met with Appellee Ramsey and was told that there were some issues she would need to look at and that she would probably contact Appellant the next week. R 249/73 (JB Depo 73:16-18). Appellant gave Appellee Ramsey copies of the city ordinances, the permit the City had issued Appellant, and

Appellant's contract with George Calvert, from whom he had purchased Location B. Appellee Ramsey told Appellant that Location B was not eligible for a permit to sell beer and wine because it was located within 1,000 feet of an athletic field and a day care facility. R 249/73 (JB Depo 73:18-21). No disagreements with Lawson, rent, or locations other than Location A and Location B were discussed at this meeting. When asked by Appellant, Appellee Ramsey denied having talked to Lawson about the situation. R 249/70 (JB Depo 64:8 through 65:17); R 255; R 297/3.

On or about March 3, 2000, Appellant hired the law firm of Nacol, Wortham and Associates, P.C. to help him obtain a permit. R 249/174 (MW Depo 14:20 through 15:2) Michael P. Wortham ("Wortham") of Nacol, Wortham and Associates, P.C. wrote Appellee Ramsey on March 3, 2000 informing her that the position of the City, as she had represented to Appellant, was without merit and that there was no basis for the City's request that Maloney hold Appellant's application. R 249/175 (MW Depo 17:1-4)) The letter stated that the City ordinance did not mention day care centers and, as a result, the presence of day care centers such as The Children's Depot Learning Center and Our Kid's Tree House Child Care could not form a basis for a protest of Appellant's application; that the ordinance did not mention athletic facilities and athletic facilities such as the park mentioned by Defendants are not schools and could not form a basis for a protest; that there was no public school within 1,000 feet of the subject location; and that Terrell Christian Academy, a private school in the area, was not a public school. R 255-256; R 297/21 (MW Aff 4).

The letter also requested that Appellee Ramsey inform Wortham of her position on the matter as soon as possible because Appellant desired to begin selling beer and wine at location B on March 7, 2000 and could not do so without the permit. R 249/176 (MW Depo 23:14-23); R 256; R 297/21 (MW Aff 4).

Appellee Ramsey did not respond to the letter and after several days Wortham began attempting to contact her and Maloney by telephone. Appellee Ramsey was difficult to reach during this

time as she rarely took or returned calls. After not taking or returning his call for several days, Appellee Ramsey finally took a telephone call from Wortham. Initially, Appellee Ramsey would not communicate a reason for her opposition to the grant of Appellant's permit or the authority for such opposition, but stated that city employees needed to measure the distance between Location B and a day care center, school and park in the area before the City would consider certifying the application. R 249/175 (MW Depo 18:13-19), 177 (MW Depo 25:17-25), 180 (MW Depo 37:21-38); R 256; R 297/21 (MW Aff 5-6).

The measurements and the City's actions on the matter were delayed several times for various reasons, including Appellee Ramsey's alleged vacations and illnesses. Appellee Ramsey avoided Appellant's counsel and made up a variety of excuses to keep from discussing the City's protest or the reasons therefore or resolving the issues involved. R 249/180 (MW Depo 37:15 through 38:14); R 297/22. (MW Aff 7). Maloney would not give Wortham a reason for his refusal to forward the application to the TABC in Austin other than the fact that he had been requested to hold the application in order to allow the City to "protest" the permit. He would rarely talk to Wortham and would not ever state a valid reason to not forward the application to Austin for processing. R 249/181 (MW Depo 43:23 through 44:14); R 257; R 297/22 (MW Aff 8).

On March 9, 2000, Appellant was informed by the City building inspector's office that the inspection previously scheduled for Location B necessary for Appellant to obtain a certificate of occupancy had been "put on hold" but was not given a reason for same. On March 10, 2000, Will Cole, building inspector for the City, told Appellant that he had been instructed by Appellee Ramsey not to inspect Location B or grant a certificate of occupancy. After numerous telephone calls from Wortham to Appellee Ramsey, none which were taken or returned, and several discussions between Appellant and Cole, the certificate of occupancy was finally granted the next week. R 249/75-76 (JB Depo 82:7 through 86:24); R 257-258; R 297/22 (MW Aff 9).

Lawson procured tenants for Location A, the Rodriguzes. R 249/161 (GL Depo 41:14 through 42:4). On or about March 14, 2000, Lawson's attorney submitted a letter to Appellee Ramsey stating that the premises at Location A had been "grandfathered" to receiving a Beer and Wine Permit and the City's certification for said permit. R 249/1-2, 24, 218 (MGR Depo 106:19-22), 279; R 258.

The Texas Alcoholic Beverage Code provides "[i]f at the time an original alcoholic beverage permit or license is granted for a premises the premises satisfied the requirement regarding distance from schools, churches and other types of premises established in this code and any other law or ordinance of the state or a political subdivision of this state in effect at that time, the premises shall be deemed to satisfy the distance requirements for all subsequent renewals of the license or permit." See Tex. Alco. Bev. Code §109.59(a). Moreover, the code provides "[o]n the sale or transfer of the premises or the business on the premises in which a new original license or permit is required for the premises, the premises shall be deemed to satisfy any distance requirements as if the issuance of the new original permit or license were a renewal of a previously held permit or license." See Tex. Alco. Bev. Code §109.59(b)(emphasis added). R 258.

It is Appellants' position that because Lawson's tenants moved into Location A, where Appellant held a beer and wine permit for many years, their application satisfied the relevant distance requirements pursuant to the above statutes and that Location A was "grandfathered" into receiving a permit and certification from the City and the City and Rounsavall certified the Rodriguez' application for Location A based on the "grandfather" clause. R 249/114 (JR Depo 46:25 through 48:23); 225 (MGR Depo 132:8 through 133:8); R 258.

On April 14, 2000, Lawson's tenants obtained a Beer and Wine Permit for Location A. R 249/145 (HR Depo 13:8-9); R 259.

On or about March 14, 2000, Rounsavall notified Appellant via letter that the City was protesting Appellant's application for a

permit. No reason was given for the "protest." Rounsavall stated that the "protest is being filed pending our determination of compliance with our ordinance in regard to the location that is specified in the application" in regard to Location B. R 249/3-6, 118-119 (JR Depo 62:3-6, 62:20 through 63:9), 251; R 259.

On or about March 15, 2000, Appellant ceased operating from Location A and began operating from Location B. R 249/62 (JB Depo 32:6-10); R 259.

On or about March 15, 2000, Appellant filed an Original Petition for Declaratory Judgment and Injunction, Cause No. 56540, seeking that the Court enjoin the City and its agents from: (a) attempting to enforce Ordinance 1939 of the City against Appellant at Location B; (b) continuing to withhold its certification of Appellant's application for a permit; and (c) causing Maloney to deliver the applications and approvals to the TABC for final approval. R 249/7-9, 10-37, 177 (MW Depo 26:2-5, and 27:20-22); R 259-260.

In her deposition Appellee Ramsey testified that she ceased handling the case and Jason Marshall began representing the City on March 15, 2000. R 249/243 (MGR 203:4 through 204:24). However, Appellee Ramsey's role remained the same and she continued representing the City until May 31, 2000, as evidenced in her continued communications with Wortham and by the facsimile dated May 2, 2000 letter from Peter Smith of Nichols, Jackson, Dillard, Hager & Smith, L.L.P. to Wortham stating that his firm does not represent the City and to continue dealing with Appellee Ramsey.

Appellee Ramsey never stated to Wortham that she was not representing the City until the May 31, 2000 hearing when Marshall entered the case. R 249/183 (MW Depo 49:11-21); R 261; R 297/22-23 (MW Aff 10).

On or about March 15, 2000, Wortham sent an open records request to Rounsavall. Wortham did not have access to the City Ordinances of Terrell, and asked Appellee Ramsey if she would

send them but she refused to do so and suggested that he make an open records request. R 249/178 (MW Depo 29:5-19, 30:5-11, 31:4-20); R 261; R 297/23.

On or about March 17, 2000, Appellee Ramsey submitted a letter to Wortham stating that the reason for the City's protest of Appellant's application was that Location B "appears to be in violation of the City Ordinance and State Law in that the location is within 1,000 feet of an educational institution, namely Terrell Christian Academy." R 249/1-2, 178 (MW Depo 31:21 through 32:6), 202-203 (MGR Depo 44:15 through 45:1), 207 (MGR Depo 63:24 through 64:5), 210 (MGR Depo 73:7 through 74:2), 238 (MGR Depo 183:13-15), 252; R 261; R 297/23 (MW Aff 11).

On or about March 17, 2000, Wortham submitted a letter to Appellee Ramsey attempting to ascertain the statute or ordinance relied upon in her March 17, 2000 letter, resolve the dispute between Appellant and the City and to gain Appellee Ramsey's cooperation with regard several aspects regarding the lawsuit. The letter also contained information to support the fact that Appellant's business derived less than 50 percent of its gross receipts from the sale of alcoholic beverages; gave Appellee Ramsey the opportunity to review records supporting same and explained that the 1,000 foot restriction in the state statute was inapplicable to Appellant as a result. The letter also stated that pursuant to Section 109.33(a) of the Texas Alcoholic Beverage Code cities "may enact regulations" governing the sale of alcohol within parameters set out in the statute; that this statute merely enabled cities to govern the sale of alcohol if the cities so desire and sets up guidelines for the cities to follow in such regulation and that the statute does not purport to set up the regulations itself; that pursuant to Section 109.57 of the Texas Alcoholic Beverage Code cities may not be more restrictive than the state in regulating the sale of alcoholic beverages or attempt to regulate the sale of alcohol in a manner not stated in the Texas Alcoholic Beverage Code; that Ordinance No. 1939 attempts to regulate the sale of alcohol in a manner not provided for by the Texas Alcoholic Beverage Code and is more restrictive than the Texas Alcoholic Beverage Code. All of these facts were confirmed

in a telephone conversation between Wortham, Appellee Ramsey and Dewey Bracken, an attorney for the TABC. R 249/178 (MW Depo 32:7-10), 180 (MW Depo 39:24 through 43:3), 239 (MGR Depo 190:2 through 191:14; R 262; R 297/23 (MW Aff 23).

Appellee Ramsey did not respond to the letter but Wortham continued to attempt to contact her and discuss the matter with her. On or about March 21, 2000, Wortham sent Appellee Ramsey a letter outlining Appellant's sales and the percentage of said sales which were derived from beer and wine sales. R 249/117 (JR Depo 59:25 through 60:12), 182 (MW Depo 47:6-9, 48:1-20), 202 (MGR Depo 43:7-14), 213 (MGR Depo 87:7-15), 257; R 262-263; R 297/23 (MW Aff 12).

In a telephone conversation with Wortham or on about March 21, 2000, Appellee Ramsey stopped asserting the validity of Ordinance 1939 and began asserting that the City was protesting Appellant's application based upon an ordinance that prohibited the sale of alcoholic beverages in residential sections of the City even though Location B was in an area of the City zoned retail and not affected by the ordinance. R 249/183 (MW Depo 51:1-14), 266. She cited Chapter 5, Section 2D of the Code of Ordinances of the City of Terrell to Wortham and partially read it to him over the telephone and then transmitted it to him via facsimile on March 21, 2000. The ordinance reads as follows:

> "D. SALE IN RESIDENTIAL AREAS IS PROHIBITED
>
> The sale of alcoholic beverages, beer, and wine is prohibited within the residential sections of the city. For the purpose of this subsection, and as a matter of definition, all of the city lying within the corporate limits thereof shall be construed and is hereby designated as residential sections of the city, save and except those areas designated by the zoning ordinance, and amendments thereto, as commercial district (C), central area district (CA), retail district (R), light industrial district (LI), and

> heavy industrial district (HI). No store for the purpose of the sale of alcoholic beverages, wine, or beer will be located in any area of the city designated as residential. (Sec. 4-3, 1968 Code of Ordinances) R 263; R 297/23 (MW Aff 13).

After receiving and reviewing the ordinance, Wortham attempted to contact Appellee Ramsey but she would not take his telephone call. As a result, on or about March 23, 2000, after determining that Location B was zoned "Retail," Wortham sent a letter to Appellee Ramsey which stated that although the ordinance prohibits the sale of alcoholic beverages in residential sections of the City, Location B was in an area of the City zoned retail and not affected by the prohibition. R 249/183 (MW Depo 51:1-14), 266. She refused to change the City's position with regard to this matter. R 263; R 297/23-24 (MW Aff 14).

Without Appellant's knowledge, on March 21, 2000, Rounsavall sent an "Affidavit" to the TABC stating, among other things, that "[t]he application for Handy Mart No. 1 submitted by Appellant does not comply with the ordinances of the City regarding the sale of alcoholic beverages in residential areas." Rounsavall was relying on Section 2(D) of Chapter 5 of the City Ordinances. R 297/33-37. The City did not furnish a copy of the "Affidavit" to Appellant or his attorney. R 264; R 297/3 (MW Aff 8), 24 (MW Aff 15).

Sometime in late March, Maloney forwarded Appellant's application to the TABC in Austin. As a result, the action initiated by Appellant against the City on March 15, 2000 was nonsuited. R 249/32,177 (MW Depo 26:2 through 27:21); R 264.

On April 10, 2000, Brian Guenthner, Licensing Department Director for the TABC, sent a letter to Appellant stating that Appellant's application was incomplete and could not be approved due to the "the fact that the City has withdrawn their certification." R 144. The TABC took the position that the application would not be processed, granted or disapproved until the City certified whether

the sale of alcoholic beverages at subject location was prohibited by a City ordinance pursuant to Section 11.37 of the Texas Alcoholic Beverage Code as opposed to withdrawing its Certification. R 264; R 297/3 (JB Aff 9), 19.

Defendants allege that on April 12, 2000, Rounsavall submitted a letter to Maloney outlining the reasons for the protest of Appellant's application. More specifically, Rousavall explained that "the proposed establishment will be located within one thousand feet (1,000') of a public school or other educational institution located in a residential area." R 249/3-6, 101. A copy of this letter was not provided to Appellant until after this lawsuit was filed. R 265; R 297/3 (JB Aff 10), 24 (MW Aff 18).

Upon receipt of the April 10, 2000 letter from Guenthner, Wortham contacted Guenthner by telephone and Guenther stated that he had received the March 21, 2000 "Affidavit"from Rounsavall and reiterated the position set out in his April 10, 2000 letter. No mention was ever made by Guenthner to Wortham of the April 12, 2000, letter from Rounsavall to Maloney. Wortham asked for a copy of the March 21, 2000 "Affidavit" and was told by Guenthner to request same in writing. On April 18, 2000, Wortham sent Guenther a facsimile requesting all documentation in the possession of the TABC regarding Appellant, including the March 21, 2000 "Affidavit." R 265; R 297/24 (MW Aff 17-18).

On or about April 26, 2000, Guenthner sent Wortham the TABC file regarding Appellant's application. The April 12, 2000 letter was not a part of that file. R 265; R 297/25 (MW Aff 17).

After receipt of the letter from Guenthner containing the TABC file and the March 21, 2000 "Affidavit," on May 2, 2000, Wortham sent a letter to Appellee Ramsey stating that he had become aware of the March 21, 2000 "Affidavit" and that the position set out in the "Affidavit" was the last position that had been relayed from Appellee Ramsey to him and once again outlined Appellant's position that the City should certify Appellant's application. R 249/185 (MW Depo 58:9-19), 271; R 297/25 (MW

Aff 18). Wortham also sent a copy of the same letter to Peter Smith, who responded that same day telling Wortham that his firm did not represent the City and to continue dealing with Appellee Ramsey. R 249/7-9, 33-53, 177; R 265-266; R 297/22 (MW Aff 10).

As a result of the position taken by the City in Mr. Rounsavall's "Affidavit" and Appellee Ramsey's failure to communicate with Wortham, on May 5, 2000, Appellant filed an Original Petition for Writ of Mandamus, Cause No. 56794, seeking, inter alia, that the Court issue a writ of mandamus requiring the City and Rounsavall to certify the Appellant's application. R 249/185 (MW Depo 58:9-19); R 271; R 266.

On the day of the hearing on the petition, May 31, 2000, the City filed Defendants' Original Answer and Plea to the Jurisdiction, which stated that "Appellant's establishment is not in compliance with City Ordinances limiting the sale of alcoholic beverages within 1,000 feet of a public school or other educational institution. . . " The City asserted that it was not relying on Chapter 5, Section 2D, but on Ordinance 1939 because the subject location was within 1,000 feet of a private school. As a result, the hearing was canceled. At the hearing, Jason Marshall stated to the Court that he had been retained to represent the City on May 30, 2000. After this date, Defendants began looking for a way that Appellant could be granted his permit in a manner that would allow Defendants to "save face." R 266-267; R 297/25 (MW Aff 20).

Appellant then filed Relator's Second Amended Original Petition for Declaratory Judgment, Injunction and Writ of Mandamus which was set for hearing on June 27, 2000. R 267; R 297/25 (MW Aff 20).

On or about June 15, 2000, Marshall submitted a letter to the TABC articulating the City's position that the TABC should grant Appellant's application for a permit over the City's objection. R 249/7-9, 273. The City refused to withdraw its objection. R 267; R 297/26 (MW Aff 21).

On or about June 28, 2000, the Kaufman County District Court dismissed Appellant's case. R 249/7-9, 54. Lawson, Cole, Appellee Ramsey, and Maloney all appeared at one or both of the hearings and socialized before the hearings began. R 249/64 (JB Depo 119:12-25), 166 (GL Depo 62:13-18). Lawson testified in his deposition that he did not know Cole, but socialized with him as stated above. R 267; R 297/26 (MW Aff 22).

On or about July 27, 2000, Rounsavall submitted a letter to the TABC withdrawing the City's protest of Appellant's application, explaining that "[t]he applicant has provided information to the Attorney representing the City of Terrell in this case to certify that while the proposed premises will be within 1000 feet of a public school, based upon information provided by the Applicant, less than 50% of the gross sales, excluding gasoline sales, will be from the sale of beer and wine, making the City's 1000 foot distance requirement inapplicable." R 249/3-6, 72 (JB Depo 71:3-6), 86 (JB Depo 125:20 through 126:7), 102, 121 (JR Depo 74:9-18), 122 (JR Depo 79:11-15), 130 (JR Depo 111:21 through 112:7), 277. The information referred to by Rounsavall had been provided and/or made available to the City beginning in March 2000. At any time between early March, when Defendants became aware of this information, and July 27, 2001, Defendants could have withdrawn the protest or otherwise stopped blocking the application for these reasons. In August 2000, Appellant obtained certification and a Beer and Wine Permit for Location B. R 249/60 (JB Depo 24:11-25), 71 (JB Depo 68:22-25), 86 (JB Depo 126:16-19; R 297/26 (MW Aff 23). However, as a result of the conduct of Appellees, Appellant was forced to sell the store due to lost profits and ruined product. R 267-268.

B. Disposition of Issue Below

The United States Court of Appeals for the Fifth Circuit affirmed the summary judgment granted by the trial court.

## REASONS FOR GRANTING THE PETITION

A. The Circuits are divided in their interpretation of *Village Willowbrook* and whether animus or ill will is necessary to prosecute a "class-of-one" equal protection or selective enforcement claim.

In *Village of Willowbrook, et al. v. Olech*, 528 U.S. 562 (2000), the Supreme Court, in a per curiam opinion, held that the Equal Protection Clause gives rise to a cause of action on behalf of a "class of one" even when the plaintiff does not allege membership in a protected class or group if the plaintiff has been intentionally treated differently from others similarly situated and there is no rational basis for this difference in treatment. The Supreme Court set out no requirement that a plaintiff must allege "an illegitimate animus or ill-will motivated his intentionally different treatment from others similarly situated and that no rational basis existed for such treatment." R 276.

The Supreme Court stated that "the purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." (R 276)

In *Olech*, the plaintiff alleged that the defendant had intentionally demanded a 33-foot easement as a condition of connecting the plaintiff's property to the municipal water supply when it required only a 15-foot easement from other similarly situated property owners; that this demand was "irrational and wholly arbitrary" and that the Village ultimately connected the plaintiff's property after receiving a clearly adequate 15-foot easement. R 276.

In our case, the City protested Appellant's application despite having no basis to do so and approved the application of Appellant's neighbor, Lawson's tenant in Location A, to receive a permit. The Defendant's conduct in doing so was "irrational and

wholly arbitrary." The City ultimately withdrew its protest after determining that it should not have protested initially. R 277.

The Supreme Court held that the allegations in *Olech*, "quite apart from the *Village's* subjective motivation, are sufficient to state a claim for relief under traditional equal protection analysis. R 276.

The lower court in *Olech* required a plaintiff produce evidence of the defendant officials' subjective motivation, but not necessarily evidence of similarly situated persons who were treated differently. The Supreme Court's explanation, on the other hand, requires a plaintiff to produce evidence that similarly situated persons were treated differently, but not any evidence of the defendant's subjective motivation for conduct being challenged. 528 U.S. at 564 (recognizing an equal protection claim where a plaintiff alleges different treatment from others similarly situated); id at 565 (indicating that the Court's decision was not based on the theory of "subjective ill will"). The Supreme Court explicitly distanced itself from the "subjective ill will" theory. Id at 565. The majority decision in fact expressly disavows subjective ill will. Id. ("These allegations, quite apart from the Village's subjective motivation, are sufficient to state a claim for relief under traditional equal protection analysis.") The Court specifically noted that "(we) do not reach the alternative theory of 'subjective ill will' relied on (by the Seventh Circuit." Id at 565.

The *Olech* decision makes it clear that when a person is subjected to different treatment that is "irrational or wholly arbitrary" he may bring a claim under the Equal Protection Clause. 528 U.S. at 563.

While *Olech* allows a "class of one" claimant to bring a claim under the Equal Protection Clause, the Court did not provide a clear standard for analyzing such claims.

After the decision in *Olech*, Judge Posner of the Seventh Circuit articulated a standard for "class of one" claims, and other circuits have developed different standards. In *Hilton v. City of*

*Wheeling*, 209 F.3d 1005 (7th Cir 2000), the Seventh Circuit held "that to make out a prima facie case the plaintiff must present evidence that the defendant deliberately sought to deprive him of equal protection of the laws for reasons of a personal nature unrelated to the duties of the defendant's position." Id at 1008. Thus, in the Seventh Circuit, it appears that a plaintiff must show some equivalent of "ill will" or animus to proceed under a "class of one" claim.

The Fifth Circuit, in *Bryan v. The City of Madison*, 213 F3d 267 (5th Cir 2000), cert. denied, 531 U.S. 1145 (2001), stated in a footnote that that *Olech* did not change the Fifth Circuit requirement of improper motive. Id at 277 n. 14. ([*Olech*] does not . . . alter our requirement of an improper motive, such as racial animus, for selective enforcement claims.) The Fifth Circuit held that "to successfully bring a selective enforcement claim, a plaintiff must prove that a government official's acts were motivated by improper considerations, such as race, religion, or the desire to prevent a constitutional right." Id. at 268. Addressing *Olech*, the Fifth Circuit stated "(*Olech*) merely stands for the proposition that single plaintiffs may bring equal protection claims . . . (b)ut this statement has nothing to do with whether they must assert membership in a larger protected class. The decision does not, therefore alter our requirement of an improper motive, such as racial animus, for selective enforcement claim." Id at 277 n. 17.

The Fourth Circuit, in *Greenspring Racquet Club, Inc. v. Baltimore County*, 2000 WL 1624496 (4th Cir. Oct. 31, 2000) (unpublished opinion) dismissed a claim where a developer alleged a restrictive zoning change was "adopted in bad faith, with an intent to discriminate against (the plaintiff)." Id at *2. The Fourth Circuit applied traditional Equal Protection analysis requiring only a rational relation between the decision and a legitimate government interest in rejecting the claim. The Court noted that the *Olech* decision did not change fundamental equal protection jurisprudence. "Where an obvious legitimate purpose is evident on the face of a challenged law, an equal protection claim under rational basis review must fail." Id.

The Second Circuit has also had trouble interpreting the meaning of *Olech*. Before *Olech* the Second Circuit had already developed a two-part test in cases of selective treatment that anticipated the alternative interpretations of *Olech*. In *LeClair v. Sanders*, 627 F.2d 606 (2nd Cir. 1980), the Second Circuit considered an allegation of an equal protection violation in the selective enforcement of a dairy farm regulation. Id at 607-08. The court explained that liability would depend on proof that (1) the person, compared with others similarly situated, was selectively treated; and (2) that such selective treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person." Id. at 609-610.

The Second Circuit has had a difficult time in determining exactly how much is left of the LeClair Standard after *Olech*. In three separate attempts at explaining the effect of *Olech*, the Second Circuit did not resolve the issue of whether a plaintiff must prove both elements of the LeClair standard or only one of them. See *Giordano v. City of New York*, 274 F.3d 740 (2d Cir. 2001); *Harlen Assocs. v. Vill. Of Mineola*, 273 F.3d 494 (2d Cir 2001); *Gelb v. Bd. Of Elections*, 224 F.3d 149 (2d Cir. 2000). In each of the cases, the court found that it did not need to decide that issue because in each case, the plaintiff was unable to prove either element.

At nearly the same time in the Second Circuit, in *Jackson v. Burke*, 256 F3d 93, 2nd Cir (N.Y.) July 11, 2001, the United States Court of Appeals for the Second Circuit addressed an inmate's Equal Protection "class of one" claim. The Court, when citing *Olech*, specifically stated, "proof of subjective ill will is not an essential element of a 'class of one' equal protection claim." However, the most recent cases from the district courts within the Second Circuit now seem to be of the view that in order to make a "class of one" claim, a plaintiff must prove either intentionally different treatment of similarly situated persons or subjective ill will.

The Federal District Courts are split in the application of *Olech*, specifically regarding whether subjective ill-will is necessary

for a class of one claim. In deciding that the plaintiff in *Olech* had a valid claim under the Equal Protection clause, the Supreme Court stated that "previous cases have recognized successful equal protection claims brought by a class of one where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." 528 U.S. at 564. The Court applied this reasoning to the set of facts in *Olech*. The allegations that the Village of *Olech* treated the plaintiff differently than others similarly situated was enough to state a claim for which relief could be granted under traditional equal protection analysis. The Court did not reply on the theory of "subjective ill will" as applied by Judge Posner in the Seventh Circuit.

Since the Circuit Courts are divided in their interpretation of *Olech*, the Supreme Court should clarify its *pur curiam* ruling and clearly set forth the requirements of a "class of one" equal protection claim.

B. The Decision of the Court of Appeals is Erroneous; Evidence of Improper Motive of the Defendants Exists.

As set out above, it is not necessary to prove that illegitimate animus or ill-will motivated the Defendants' conduct to bring a "class of one" equal protection claim.

Notwithstanding the above, Appellees herein deliberately sought to deprive Appellant of his permit and equal protection of laws for reasons of a personal nature and took a variety of actions to prevent him from obtaining a permit even though the actions were not supported by law or fact. R 277.

The acts of Appellees support the fact that their actions were improperly motivated:

(1) Appellee Ramsey adopted a variety of meritless positions to support the City's protest of Beeler's license, ignoring the law and facts.

(2) Each time Appellee Ramsey received an explanation as to why her position was meritless she changed positions, adopting a new position and basis therefore.

(3) Instead of following recognized procedures, Defendants secretly requested Maloney to "hold" Beeler's application.

(4) Appellee Ramsey would not take or return Wortham's telephone calls, and gave a variety of excuses to avoid dealing with the case, including vacations, dealing with her children and the fact that the case was not a priority with her.

(5) Once Marshall began representing the City, the City began looking for a manner in which Beeler could be granted a license while the City "saved face."

(6) The City opposed Beeler only after being approached by Lawson; Rounsavall's story regarding the change of address is implausible.

(7) The City withdrew its protest in late July for reasons it was aware of in March.

(8) Lawson did not like Beeler because Beeler terminated his lease with him and had a dispute with him regarding Beeler's alleged violation of the provisions of his lease agreement.

(9) Defendants knew Beeler would be in serious financial trouble without the permit.

(10) Beeler was from Missouri and lived in Dallas; Lawson lived in Terrell and has known Appellee Ramsey for most of her life.

(11) The same ordinances and statutes should have been applied uniformly to Beeler in Location B and Lawson's tenant in Location A.

(12) Defendants used the "grandfather clause" position to help Lawson's tenant get a permit.

(13) The City recognized state laws when convenient (using the grandfather clause as an excuse to grant Location A a license and exempting Beeler on July 27) and did not recognize state laws when convenient. (Ordinance 1939 not affected by state laws.)

(14) Appellee Ramsey responded to Mallard but not to Wortham.

(15) A copy of Rounsavall's April 12 letter to the TABC was not provided to Beeler until the litigation began.
R 282-283.

C. The Court erred in determining that Appellant's new store, Location B, was not similarly situated to the site of his old store, Location A and that he was not treated differently than the proprietor of the store at Location A.

The Texas Alcoholic Beverage Code provides "[i]f at the time an original alcoholic beverage permit or license is granted for a premises the premises satisfied the requirement regarding distance from schools, churches and other types of premises established in this code and any other law or ordinance of the state or a political subdivision of this state in effect at that time, the premises shall be deemed to satisfy the distance requirements for all subsequent renewals of the license or permit." See Tex. Alco. Bev. Code §109.59(a).

Moreover, the code provides "[o]n the sale or transfer of the premises or the business on the premises in which a new original license or permit is required for the premises, the premises shall be deemed to satisfy any distance requirements as if the issuance of the new original permit or license were a renewal of a previously held permit or license." See Tex. Alco. Bev. Code §109.59(b)(emphasis added). R 258.

It is Appellees' position that because the Rodriguez'tenants moved into Location A, where Appellant held a beer and wine permit for many years, their application satisfied the relevant distance requirements pursuant to the above statutes and that Location A was "grandfathered" into receiving a permit and certification from the City and the City and Rounsavall certified the Rodriguez' application for Location A based on the "grandfather" clause. R 249/114 (JR Depo 46:25 through 48:23); 225 (MGR Depo 132:8 through 133:8); R 258.

The Court held that Appellant must demonstrate that he and Lawson's tenants, the Rodriguezes, were similarly situated and were treated differently as a prerequisite to an equal protection claim. The Court stated that since a permit had never been issued for Location B, Appellant's site, the application was treated as an application for a new permit. The Court also stated that since permits were issued for Location A, the Rodriguez site, to Appellant and others for more than a decade, the Rodriguez application was treated as the renewal of a permit as opposed to an application for a new permit. This is error. The Rodriguezes were applying for a new permit. It is undisputed that they had never held a permit at Location A, did not purchase Location A and did not purchase Appellant's business or anyone's business located at Location A. The Rodriguezes opened a new business in a building they rented that had previously housed a business that had held a permit. Their application was an application for a new permit, as was Appellant's.

Appellant was treated much differently than the Rodriguezes. The Rodriguezes' application was delayed for less than two weeks and was quickly certified once the City learned that Lawson supported the certification. The City delayed Beeler's permit for more than five months despite the fact that (1) Beeler had pointed out to city officials that there was no basis for not certifying the permit and city officials knew there was no basis for doing so, (2) the City had previously represented to Beeler that beer and wine could be sold from the subject property, (3) the TABC had informed the City that beer and wine could be sold from the subject property, (4) the City

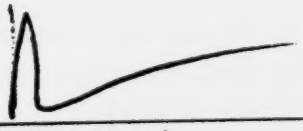
had certified the Rodriguezes' permit and the Rodriguezes were selling beer and wine from Location A.

## CONCLUSION

The Circuit Courts are unsure how to apply the Supreme Court's ruling in *Olech*, and need clarification as to the necessary elements of a "class of one" equal protection claim.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,



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# APPENDIX

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE FIFTH CIRCUIT**

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**Filed May 7, 2003**

NO. 02-10360

**Charles R. Fulbruge III, Clerk**

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JON BEELER,

Plaintiff-Appellant,

versus

JOHN ROUNSAVALL, MARY GAYLE RAMSEY, and THE CITY OF TERRELL, TEXAS,

Defendants-Appellees.

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Appeal from the United States District Court
For the Norther District of Texas

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Before BENAVIDES, STEWART, and CLEMENT, Circuit Judges.

EDITH BROWN CLEMENT, Circuit Judge:

The issue on appeal is whether the district court erred in granting summary judgment in favor of John Rounsavall ("Rounsavall"), City Secretary; Mary Gayle Ramsey ("Ramsey"), City Attorney; and the City of Terrell, Texas, ("the City") on the appellant's "class of one" equal protection claim. We affirm. [Page 1]

## I. FACTS AND PROCEEDINGS

Under the Texas Alcoholic Beverage Code ("the Code"), an operator of a convenience store must apply for a beer and wine permit ("permit") if beer and/or wine will be sold at the location. TEX. ALCO. BEV. CODE §§11.01(a), 11.31, 11.32. The Texas Alcoholic Beverage Commission ("TABC") has the discretionary authority to grant or refuse requested permits. *Id.* §§ 11.01(a), 11.43, 11.46.

Under the Code, incorporated cities and towns may regulate the sale of beer and wine. *Id.* §§ 109.31-33. Pursuant to this authority, the City passed two ordinances in 1984 and 1998, respectively, that established distance requirements for businesses

selling alcoholic beverages. The first ordinance ("Ordinance 1345") prohibited the sale of beer and wine from any locations that were within 300 feet of a church, school, or other educational institution, and the second ordinance ("Ordinance 1939") restricted the sale of beer and wine within 1000 feet of a public school or other educational institution.

The practical effect of Ordinance 1939 was somewhat minimized by the Code's differential treatment of applications for new permits and applications to renew existing permits. *Id.* §§ 11.31, 11.32. Under the Code, businesses applying for permits only needed to satisfy the distance requirements in existence at the time of their original application. Under the Code's grandfather clause, all businesses that obtained their permits prior to the passage of Ordinance 1939 were deemed "to satisfy the distance requirements for all subsequent renewals of the...permit," even if this was not true as a factual matter. *Id.* § 109.59. Of course, businesses applying for their first permit after the passage of Ordinance 1939 were required to satisfy the distance requirements contained therein. *Id.* §§ 109.31-33, 109.59.[Page 2]

In 1990, Appellant Jon Beeler ("Beeler") purchased an ongoing business--a convenience store— at 307 Ninth Street in Terrell, Texas ("Location A"). Beeler did not own the building in which his business operated or the land upon which it was situated, instead, he rented the building from Grady Lawson ("Lawson"). When Beeler purchased the business, Location A already had a permit.

In December 1999, Beeler decided to relocate his business from Location A to 305 Ninth Street in Terrell, Texas ("Location B"). Location A and Location B were adjacent buildings. Whereas the TABC had issued permits for Location A in the past, no such permit had ever been issued for Location B.[1]

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[1] Based on rumors he had heard, Lawson believed that it was not possible to sell alcoholic beverages at Location B. Beeler contended that his employee attempted to confirm the veracity of these rumors in early 1998 by contacting Rounsavall, who allegedly stated that the issuance of a permit would not violate any City

Under the Code, the City, through its City Secretary, must certify "whether the location or address given in the application is in a wet area and whether the sale of alcoholic beverages for which the permit is sought is prohibited by charter or ordinance." *Id.* § 11.37(b). On January 11, 2000, Beeler applied for a permit for Location B, and on or about the same day, the City certified that Beeler could sell beer and wine out of Location B.[2] On January 12, 2000, Beeler purchased the building located at Location B. Around the same time, Lawson found new tenants—Humberto and Ly Rodriguez ("the Rodriguezes")—to operate a convenience store at Location A. [Page 3]

Shortly after Beeler's purchase of the building at Location B, Lawson visited Rounsavall and Ramsey to question the City's certification of Beeler's application. Lawson believed that Location B had been denied a permit in the past.

Subsequently, Rounsavall determined that the City's certification was in error, so he took the necessary steps to file a protest of his certification. Rounsavall attributed his flip-flop to the mistaken belief that a new address number had been assigned to Location A. According to his affidavit, Rounsavall had not understood that Beeler was changing locations. As a result, Beeler's application was put on hold, and the City attempted to ascertain whether to certify Beeler's application.

The City's determination was delayed by bureaucratic inertia, Ramsey's personal vacations and illnesses, failure to measure the relevant distances, and disagreements over whether Ordinance 1939 applied to day care facilities, private schools, and/or athletic facilities. On March 14, 2000, Rounsavall notified Beeler that the City was protesting his application pending a determination of compliance with the relevant municipal ordinances, including Ordinance 1939.

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ordinances. However, there is no evidence in the record of such a conversation.

[2] The City provided Beeler with an official document entitled "Permit," which bore the signature of Rounsavall and noted the address of Location B (905 Ninth Street, Terrell, Texas 75160), the duration of the permit (one year), and the name of the establishment (Handy Mart #1). R. 249/100.

The next day, Beeler sought a declaratory judgment and injunction from the district court enjoining the City from enforcing Ordinance 1939, withholding its certification, and causing his application to be placed on hold. Shortly thereafter, the TABC considered Beeler's application and concluded that it could not approve it because the City withdrew its certification. As a result, Beeler's original action was nonsuited, and Beeler sought a writ of mandamus from the district court requiring the City and Rounsavall to certify his application. Beeler's second action was dismissed in late June 2000, but the next month, Rounsavall withdrew the City's letter of protest after determining that Location B satisfied the relevant municipal ordinances.

In August 2000, the City certified Beeler's application, and he received his permit. [Page 4] Subsequently, Beeler sold the store located at Location B.

The Rodriguezes also had difficulty obtaining a permit for their convenience store at Location A. On March 14, 2000, just before the Rodriguezes began operating their store, Lawson's attorney wrote to Ramsey to protest the "delay and refusal" of the City to certify the Rodriguezes' application. Evidently, the City was considering whether Location A satisfied the distance requirements established by Ordinance 1939. Lawson's attorney asserted that the Code's grandfather clause applied to Location A because the Rodriguezes were operating the same type of store at a location for which permits had been issued in the past. On April 14, 2000, the Rodriguezes obtained a permit for their store at Location A.

On November 6, 2000, Beeler filed suit against Rounsavall, Ramsey, and the City (collectively, "the Defendants") in the district court, arguing that their actions deprived Beeler of equal protection in violation of the Fourteenth Amendment. The district court characterized Beeler's claim as a "class of one" equal protection claim that required two findings: (1) illegitimate animus or ill will on the part of the Defendants, and (2) similarly situated individuals were treated differently. The district court concluded that Beeler and the Rodriguezes were not similarly situated and that the Defendants' behavior, though reprehensible, did not rise to the level of illegitimate animus or ill will. For this reason, the district court granted summary judgment in favor of the Defendants.

## II. STANDARD OF REVIEW

This Court reviews a motion for summary judgment de novo. *St. Paul Guardian Ins. Co. v. Centrum GS Ltd.*, 283 F.3d 709, 712-13 (5th Cir. 2002). The purpose of summary judgment is to pierce the pleadings and assess the proof to determine if a genuine need for trial exists. *Matsushita* [Page 5] *Elec. Indus., Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). Summary judgment is appropriate only if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. FED. R. CIV. P. 56(c); *see generally Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

## III. DISCUSSION

The instant dispute is not a straightforward equal protection claim involving a "class of one." *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). The instant dispute is more akin to the plaintiffs' claims in *Bryan v. City of Madison*, 213 F.3d 267, 276-77 (5th Cir. 2000), in which public officials repeatedly frustrated the plaintiff's plan to construct an apartment complex on land he contracted to purchase, and *Esmail v. Macrane*, 53 F.3d 176, 178-80 (7th Cir. 1995), in which public officials used their powers to delay and frustrate an applicant's efforts to obtain a liquor license. Like the plaintiff in *Bryan*, Beeler alleged that (1) the Defendants applied the municipal ordinances, including the distance requirements established by Ordinance 1939, unreasonably in his case by frustrating his application for a permit based on a failure to comply with those ordinances; and (2) the extraordinary process he faced, including the delays from March to August 2000, violated his equal protection rights. *Bryan*, 213 F.3d at 276.

"The first [claim] falls within the standard equal protection analysis. As a prerequisite to such a claim, the plaintiff must prove that similarly situated individuals were treated differently." *Id.* (citing *Wheeler v. Miller*, 168 F.3d 241, 252 (5th Cir. 1999)). In order to satisfy this prerequisite, Beeler must demonstrate that: (1) Beeler and the Rodriguezes were similarly situated, and (2) Beeler and the Rodriguezes were treated differently. [Page 6]

First, the Code clearly distinguishes between applications for new permits and applications to renew existing permits. TEX.

ALCO. BEV. CODE §§ 11.31, 11.32, 109.59. Permits were issued for Location A on a continual basis for more than a decade, but never for Location B. For this reason, the Rodriguezes' application was treated as one to renew an existing permit and Beeler's application as one for a new permit. Under the Code's grandfather clause, the distance requirements established by Ordinance 1939 only applied to Beeler's application, not to the Rodriguezes' application. *Id.* § 109.59.

Beeler argues that he was similarly situated to the Rodriguezes because the two stores were located in adjacent buildings and sold the same basic items. However, the relevant criterion here is not the two stores' proximity or the similarity of their products. Instead, the relevant question is whether the two stores were similarly situated under the Code. The Code's differential treatment of businesses applying for their first permit and businesses applying to renew their permits indicates that Beeler and the Rodriguezes were not similarly situated. Whereas Beeler was applying for a new permit, the Rodriguezes were applying to renew an existing permit. Beeler did not cite any other parties applying for new permits; therefore, Beeler failed to satisfy the first element.

Second, there is no evidence that Beeler was treated any differently from the Rodriguezes. On March 14, 2000, Lawson's attorney wrote to Ramsey complaining about the City's "delay and refusal" to certify the Rodriguezes application for a permit based on the failure of Location A to comply with the distance requirements contained in Ordinance 1939. Although the Rodriguezes received their permit before Beeler, the City appears to have treated the two parties in a similar manner by initially refusing to certify their applications and causing unnecessary delays. Therefore, Beeler failed to satisfy the second element. [Page 7]

The second claim is more properly characterized as an example of selective enforcement. *Bryan*, 213 F.3d at 277; *Allred's Produce v. U.S. Dep't of Agric.*, 178 F.3d 743, 748 (5th Cir. 2000). "The conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation." *Allred's Produce*, 178 F.3d at 748 (citing *Oyler v. Boles*, 368 U.S. 448, 456 (1962)). "[T]o successfully bring a selective prosecution or enforcement claim, a plaintiff must prove that the government official's acts were

motivated by improper considerations, such as race, religion, or the desire to prevent the exercise of a constitutional right." *Bryan*, 213 F.3d at 277. "[I]t must be shown that the selective enforcement 'was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.'" *Allred's Produce*, 178 F.3d at 748 (citing *Oyler*, 368 U.S. at 456).

Beeler's selective enforcement claim fails to satisfy this requirement. He has never alleged any improper motive by the Rounsavall, Ramsey, or the City. Indeed, Beeler offers no motive at all for the Defendants' actions.[3]

This Court stated that personal vindictiveness might be an improper motive in a selective enforcement case, but this Court has "never specifically addressed whether such a motive would be enough to support an equal protection claim without some other class-based discrimination." Id. At 277, n.18. The "text of the Equal Protection Clause, the history leading to its adoption, [and] a century of jurisprudence that has in the main interpreted the clause to prohibit only disparate treatment based upon group or class factors" suggests that personal vindictiveness by itself is insufficient as an improper motive in the absence of some other class- or group-based [Page 8] discrimination. Timothy Zick, *Angry White Males: The Equal Protection Clause and "Classes of One,"* 89 KY.L.J. 69, 75 (2000/2001). However, we need not address this issue here because Beeler has not provided any evidence of personal vindictiveness.

## IV. CONCLUSION

Viewing the evidence in the light most favorable to the non-moving party, we conclude that Beeler has not provided any evidence of similarly situated individuals, of different treatment, or of improper motives on the party of the Defendants or Lawson. Having pierced the pleadings and assessed the proof to determine if a genuine need for trial exists, we conclude that there is no genuine issue as to any material fact, and Rounsavall, Ramsey, and the City are entitled to a judgment as a matter of law. The judgment of the district court is AFFIRMED. [Page 9]

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[3] In his Deposition, Beeler conceded that neither Rounsavall nor Ramsey ever expressed any hostility toward him.

Supreme Court, U.S.
FILED

03 463 AUG 29 2003

OFFICE OF THE CLERK

NO. _____

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**IN THE SUPREME COURT OF THE UNITED STATES**

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**JON BEELER**, Petitioner

v.

**JOHN ROUNSAVALL; MARY GAYLE RAMSEY; and THE CITY OF TERRELL, TEXAS**, Respondents

---

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

---

# SUPPLEMENTAL APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI

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JON BEELER

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On Petition for Rehearing filed June 3, 2003 ..... 9A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Filed
FEB 21 2002

| | | |
|---|---|---|
| JON BEELER, | § | |
| Plaintiff, | § | |
| v. | § | |
| JOHN ROUNSAVALL, MARY | § | 3:00-CV-2441-M |
| GAYLE RAMSEY, and THE | § | |
| CITY OF TERRELL, TEXAS, | § | |
| Defendants. | § | |

ORDER GRANTING DEFENDANTS
MOTION FOR SUMMARY JUDGMENT

Before the Court is Defendants' Motion for Summary Judgment, filed November 13, 2001. Defendants seek to summarily dismiss Plaintiff's 42 U.S. § 1983 claim that Defendants deprived him of equal protection of the law in violation of the Fourteenth Amendment. On February 11, 2002, the Court heard oral argument on Defendants' Motion. For the reasons set forth in detail on the set forth in detail on the record at the February 11, 2002 hearing, the Court GRANTS Defendants' Motion in all respects. Plaintiff's claims are DISMISSED with prejudice. Costs are taxed against Plaintiff.

SO ORDERED.

DATED: February 21, 2002

BARBARA M. G. LYNN
UNITED STATES DISTRICT
JUDGE, NORTHERN DISTRICT
OF TEXAS

8A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

---

Filed June 03, 2003

NO. 02-10360

Charles R. Fulbruge III, Clerk

---

JON BEELER,

Plaintiff-Appellant,

v.

JOHN ROUNSAVALL, MARY GAYLE RAMSEY, and
THE CITY OF TERRELL, TEXAS,

Defendants-Appellees.

---

Appeal from the United States District Court
For the Norther District of Texas

---

ON PETITION FOR REHEARING

Before BENAVIDES, STEWART, and CLEMENT, Circuit Judges.
PER CURIAM:

IT IS ORDERED that the petition for rehearing is denied.
ENTERED FOR THE COURT:

---

United States Circuit Judge
REHG-2

9A

(3)

No. 03-463

Supreme Court, U.S.
FILED
OCT 21 2003
OFFICE OF THE CLERK

In The

# Supreme Court of the United States

JON BEELER,

*Petitioner,*

vs.

JOHN ROUNSAVALL, MARY GAYLE RAMSEY and THE CITY OF TERRELL, TEXAS,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## RESPONDENTS' BRIEF IN OPPOSITION

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OR CALL COLLECT (402) 342-2831

36 pp

## QUESTIONS PRESENTED

Respondents respectfully request the Supreme Court of the United States to deny the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

Whether the United States Court of Appeals for the Fifth Circuit properly ruled that "illegitimate animus or ill-will" must be proven in order to sustain a "class of one" cause of action for a violation of the equal protection clause.

Whether the United States Court of Appeals for the Fifth Circuit properly concluded that Respondents' actions were not motivated by "illegitimate animus or ill-will."

Whether the United States Court of Appeals for the Fifth Circuit properly concluded that Petitioner and his neighbor were not "similarly situated."

## LIST OF ALL PARTIES

The persons listed below are all parties to the proceeding in the court whose judgment is sought to be reviewed.

**1. JOHN ROUNSAVALL**

Represented at trial and on appeal by Peter G. Smith, NICHOLS, JACKSON, DILLARD, HAGER, & SMITH, L.L.P., 1800 Lincoln Plaza, 500 N. Akard, Dallas, Texas 75201.

**2. MARY GAYLE RAMSEY**

Represented at trial and on appeal by Peter G. Smith, NICHOLS, JACKSON, DILLARD, HAGER, & SMITH, L.L.P., 1800 Lincoln Plaza, 500 North Akard, Dallas, Texas 75201.

**3. THE CITY OF TERRELL, TEXAS**

Represented at trial and on appeal by Peter G. Smith, NICHOLS, JACKSON, DILLARD, HAGER, & SMITH, L.L.P., 1800 Lincoln Plaza, 500 North Akard, Dallas, Texas 75201.

**4. JON BEELER**

Represented at trial by and on appeal by Michael P. Wortham, NACOL, WORTHAM & ASSOCIATES, P.C., 990 South Sherman Street, Richardson, Texas 75081.

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ABBREVIATIONS

"R" refers to the appellate record and the number that follows the colon refers to the pages cited within the record. For example, "**R 249:** 3-6, 110" means page 249 of the record and pages 3-6 and 110 of the appendix, which is at page 249 of the record

"TR" refers to the Transcript of the hearing on Defendants' Motion for Summary Judgment found at Volume 5 of the Record

"JB Depo" refers to the Oral Deposition of Jon Beeler

"MGR Depo" refers to the Oral Deposition of Mary Gayle Ramsey

"JR Depo" refers to the Oral Deposition of John Rounsavall

"HR Depo" refers to the Oral Deposition of Humberto Rodriguez

"GL Depo" refers to the Oral Deposition of Grady Lawson

"MW Depo" refers to the Oral Deposition of Michael Wortham

## OPINIONS BELOW

The opinion of the court of appeals is unreported. The opinion of the district court is unreported.

## JURISDICTION

The Court of Appeals entered its judgment on May 7, 2003 (App., infra 1A-7A). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are as follows: 18 U.S.C. § 2; 21 U.S.C. § 841(a)(1); 21 U.S.C. § 841(d); 21 U.S.C. § 841(b)(1)(A)(B); 21 U.S.C. § 846.

## STATEMENT OF FACTS

### A. Background and Course of Proceedings

Pursuant to the Texas Alcoholic Beverage Code, an operator of a convenience store must apply for a beer and wine permit if beer and/or wine will be sold at the location. The Texas Alcoholic Beverage Code provides that the Texas Alcoholic Beverage Commission ("TABC") and its administrator have the discretionary authority to grant or refuse requested permits ("Beer and Wine Permit"). *See* TEX. ALCO. BEV. CODE §§ 11.43 and 11.46. The City of Terrell's role, through its City Secretary, with regard to a Beer and Wine Permit application is merely to certify "whether the location or address given in the application is in a wet area, and whether the sale of alcoholic beverages for which the permit is sought is prohibited by charter or

ordinance."[1] *See* TEX. ALCO. BEV. CODE § 11.37; (R 249: 3-6, 110 (JR Depo page 31 lines 7-12) (hereinafter pages and lines will be noted pages:lines), 111 (JR Depo 35:12-23; and 36:1-13)). Accordingly, the TABC is the agency with the authority to allow one to sell beer and wine. (R 249: 65 (JB Depo 42:16-19), 66 (JB Depo 46:18-23)).

The Texas Alcoholic Beverage Code provides "[i]f at the time an original alcoholic beverage permit or license is granted for a premises the premises satisfied the requirement regarding distance from schools, churches and other types of premises established in this code and any other law or ordinance of the state or a political subdivision of this state in effect at that time, the premises shall be deemed to satisfy the distance requirements for all subsequent renewals of the license or permit." *See* TEX. ALCO. BEV. CODE § 109.59(a). Moreover, the code provides "[o]n the sale or transfer of the premises or the business on the premises in which a new original license or permit is required for the premises, the premises shall be deemed to satisfy any distance requirements as if the issuance of the new original permit or license were a renewal of a previously held permit or license." *See* TEX. ALCO. BEV. CODE § 109.59(b).

On or about January 24, 1984, Respondent City passed and approved Ordinance 1345. Ordinance 1345 provided that "[i]t shall be unlawful for any person to sell or engage in the business of selling alcoholic beverages within the City where the place of business is situated

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[1] Notably, the City Attorney does not take any action with regard to the certification of an application for a Beer and Wine Permit. Rather, the City Attorney merely advises the City Secretary in the event that the City Secretary seeks advice. (R 249: 110 (JR Depo 31:13-16; and 32:7-9), 129 (JR Depo 105:24 through 106:7), 199 (MGR Depo 30:11-15; 31:6-12; and 31:18-24)).

within three hundred feet (300') of any church, public hospital, or school or other educational institution." (R 249: 284-285) (emphasis added).

In 1990, Petitioner purchased a business named Handy Mart No. 1 ("Handy Mart") from its operators the Stewarts ("Stewarts"). (R 249: 57 (JB Depo 10:8-13; and 11:6-10)). In 1990, when Petitioner purchased Handy Mart it was operating as a convenience store out of a building located at 307 Ninth Street, Terrell, Texas ("Location A"). (R 249: 57 (JB Depo 11:19-23), 59 (JB Depo 19:2-13)). In 1990, when Petitioner purchased Handy Mart it had a TABC Beer and Wine Permit and had been certified by Respondent City to sell beer at Location A. Thus, the former store operator was selling beer and wine from Location A when Petitioner purchased Handy Mart. (R 249: 57, 114 (JR Depo 45:8-12; and 47:3-19), (JB Depo 11:24 through 12:2), 153 (GL Depo 11:25 through 12:10), 207 (MGR Depo 64:6-14)). Every year thereafter, Petitioner was required to apply for a new Beer and Wine Permit and to obtain certification from the City regarding his application for a Beer and Wine Permit. (R 249: 57 (JB Depo 12:3-7), 119 (JR Depo 67:8-23)).

From 1990 until approximately March 15, 2000, Petitioner rented the building located at Location A from Grady Lawson ("Lawson") and operated Handy Mart out of Location A. (R 249: 57 (JB Depo 11:13-17), 59 (JB Depo 19:2-13), 153 (GL Depo 10:21-25), 155 (GL Depo 21:21-23)).

On or about October 6, 1998, Respondent City passed and adopted Ordinance 1939. Ordinance 1939 provides that "[i]t shall be unlawful for any person to sell or engage in the business of selling alcoholic beverages within the City where the place of business is within 300 feet of any church, public hospital or within 1,000 feet of public schools or other educational institutions." (R 249: 286) (emphasis added).

In December 1999, Petitioner decided to relocate Handy Mart from Location A to 305 Ninth Street ("Location B") and told Lawson to rent Location A to someone else. (R 249: 62 (JB Depo 32:11-23), 63 (JB Depo 33:1-6; 33:16-23; and 35:19 through 36:25)). No one had ever been certified to sell beer and wine from Location B; therefore, no one ever sold beer and/or wine from Location B. (R 249: 77 (JB Depo 91:6-13), 154 (GL Depo 15:23 through 16:12), 208 (MGR Depo 67:6-13)). Moreover, as early as 1990, Petitioner had been told that one could not sell beer and wine from Location B. (R 249: 64 (JB Depo 37:22 through 38:23)). Petitioner first heard this information from the Stewarts when he purchased Handy Mart. Lawson and Respondent Rounsavall were also under the impression that one could not sell beer and wine from Location B. (R 249: 116 (JR Depo 55:8-15; and 55:24-25), 117 (JR Depo 58:9-12), 124 (JR Depo 86:11-13; and 87:12-19), 154 (GL Depo 16:8-25), 155 (GL Depo 17:1-11), 159 (GL Depo 33:14-16)).

Prior to January 2000, Petitioner never experienced a delay and/or had any problems obtaining certification from the City regarding Petitioner's application for a Beer and Wine Permit. (R 249: 59 (JB Depo 18:1-4), 65 (JB Depo 42:20 through 43:22)).

In early 2000, Lawson found new tenants ("the Rodriguezes") who would be operating a convenience store named 747 Water Mart out of Location A as soon as Petitioner relocated to Location B. (R 249: 142 (HR Depo 4:8-25), 143 (HR Depo 5:12-14), 146 (HR Depo 19:18-25)).

On or about January 11, 2000, Respondent City issued Petitioner a document indicating that it was certifying Petitioner's Beer and Wine Permit application for Location B. (R 249: 3-6, 66 (JB Depo 45:20 through 46:7), 100, 115 (JR Depo 51:1-8), 118 (JR Depo 62:14-16)).

Some time between January 12, 2000 and February 23, 2000, Lawson came in to check with Respondent Rounsavall as to why Respondent City had certified Petitioner's Beer and Wine Permit considering Petitioner had relocated to Location B. (R 249: 3-6, 109 (JR Depo 28:3-25), 110 (JR Depo 29:6 through 31:1), 115 (JR Depo 51:9-25), 125 (JR Depo 91:16-18), 158 (GL Depo 31:17 through 32:25), 159 (GL Depo 33:14-16), 160 (GL Depo 40:22-25)). Lawson also contacted Respondent Ramsey to determine why the City had certified Location B for the sale of beer and wine. (R 249: 159 (GL Depo 33:4-9), 208 (MGR Depo 65:12-21), 232 (MGR Depo 162:7-25), 233 (MGR Depo 163:1-6)).

In late February 2000, Respondent Rounsavall determined that the City's certification of Petitioner's application for a Beer and Wine Permit for Location B had been issued in error. (R 249: 3-6, 69 (JB Depo 57:9 through 58:4), 114 (JR Depo 47:18-21), 115 (JR Depo 51:9 through 54:18), 119 (JR Depo 68:5-25), 120 (JR Depo 69:1-10), 209 (MGR Depo 71:16-21), 218 (MGR Depo 105:5-9)). More specifically, when the permit was issued in January 11, 2000 to Handy Mart located at Location B, Respondent Rounsavall thought that there was an address change only. (R 249: 3-6, 69 (JB Depo 57:9 through 58:4), 114 (JR Depo 47:18-21), 115 (JR Depo 51:9 through 54:18), 119 (JR Depo 68:5-25), 120 (JR Depo 69:1-10), 218 (MGR Depo 105:5-9)). That is, Respondent Rounsavall thought that a new address number had been assigned to Handy Mart, which occasionally occurs when additional numbers are added to a street. (R 249: 3-6, 69 (JB Depo 57:9 through 58:4), 114 (JR Depo 47:18-21), 115 (JR Depo 51:9 through 54:18), 119 (JR Depo 68:5-25), 120 (JR Depo 69:1-10), 218 (MGR Depo 105:5-9)).

On January 11, 2000, Respondent Rounsavall was not aware that Handy Mart was physically moving from Location A to Location B. (R 249: 3-6, 69 (JB Depo 57:9

through 58:4), 114 (JR Depo 47:18-21), 115 (JR Depo 51:9 through 54:18), 119 (JR Depo 68:5-25), 120 (JR Depo 69:1-10), 218 (MGR Depo 105:5-9)). Immediately after making said determination, Respondent Rounsavall took the necessary steps to file a protest, regarding Handy Mart's application for a Beer and Wine Permit, pending the determination of compliance with the City of Terrell's ordinances. (R 249: 3-6, 116 (JR Depo 55:8-15; and 55:24-25), 132 (JR Depo 119:8-16), 206 (MGR Depo 59:20-23)). As noted above, like Petitioner, Respondent Rounsavall was not aware of anyone ever selling beer and/or wine from Location B and was under the impression that one could not sell beer and wine from Location B. (R 249: 3-6, 116 (JR Depo 55:8-15; and 55:24-25), 117 (JR Depo 58:9-12), 124 (JR Depo 86:11-13; and 87:12-19)).

On or about February 23, 2000, Respondent Rounsavall emailed Respondent Ramsey, City Attorney for the City of Terrell, explaining the situation to her and asking her for guidance. Thereafter, Respondent Ramsey reviewed the applicable ordinances in an effort to advise Respondents City and Rounsavall. (R 249: 3-6, 127 (JR Depo 99:4-12), 194 (MGR Depo 11:22), 199 (MGR 31:25 through 32:1), 200 (MGR Depo 36:9-34), 204 (MGR Depo 49:2-25), 205 (53:24 through 54:13; and 56:7-12), 223 (MGR Depo 124:5-11), 278).

On or about March 3, 2000, Petitioner's attorney, Mr. Michael P. Wortham ("Wortham"), submitted a letter to Respondent Ramsey outlining Petitioner's position that Respondent City should certify Petitioner's Beer and Wine Permit application. (R 249: 174-175 (MW Depo 16:25 through 17:8), 175 (MW Depo 17:24 through 18:12), 250). Respondent Rounsavall did not see this letter. (R 249: 111 (JR Depo 34:7-9), 116 (54:22 through 55:7), 126 (JR Depo 93:14-22; and 94:12-23), 127 (JR Depo 98:23 through 100:13), 222 (MGR Depo 122:22-25), 223 (MGR Depo 123:12-14)). After receiving said letter, Wortham and

Respondent Ramsey had various discussions regarding the subject property in relation to the City of Terrell's Ordinances. (R 249: 203 (MGR Depo 47:1 through 48:5), 237 (MGR 181:3-7)).

On or about March 14, 2000, Lawson's attorney, Mr. David Mallard, submitted a letter to Respondent Ramsey explaining that the premises at Location A had been "grandfathered" to receiving a Beer and Wine Permit and the City's certification for said permit pursuant to Section 109.59(a) and (b) of the Texas Alcoholic Beverage Code. (R 249: 1-2, 218 (MGR Depo 106:19-22), 279).

On or about March 14, 2000, Respondent Rounsavall submitted a letter to Petitioner notifying him that the City was protesting Petitioner's application for a Beer and Wine Permit pending a determination of compliance with the City of Terrell's ordinances in regard to Location B. (R 249: 3-6, 118 (JR Depo 62:3-6), 251).

On or about March 15, 2000, Petitioner ceased operating Handy Mart from Location A because his lease for said location expired and because Petitioner was relocating to Location B to begin operation of his business on or about that same day. Notably, Petitioner continued to operate Handy Mart out of Location A until March 15, 2000 and continued to sell beer and wine from Location A. (R 249: 62 (JB Depo 32:6-10), 64 (JB Depo 39:14-22), 164 (GL Depo 56:14-24)). Immediately thereafter, the Rodriguezes began operating 747 Water Mart out of Location A. (R 249: 65 (JB Depo 41:10-17)).

On or about March 15, 2000, Petitioner filed an Original Petition for Declaratory Judgment and Injunction, Cause No. 56540, seeking that the Court enjoin Respondent City and its agents from: (a) attempting to enforce Ordinance 1939 of the City of Terrell against Petitioner at his new place of business at Location B; (b) continuing to withhold its certification of Petitioner's

application for a Beer and Wine Permit; and (c) from causing Tim Maloney ("Maloney"), agent from the TABC, to not deliver the application and approvals to the TABC for final approval. (R 249: 7-9, 10-31, 177 (MW Depo 26:2-5; and 27:20-22)).

Location B is within: (a) 700 feet of Children's Depot Learning Center; (b) 580 feet of Our Kid's Tree House Child Care; (c) 740 feet of Terrell Christian Academy; and (d) 600 feet of a Terrell Independent School District baseball facility. (R 249: 3-6, 130 (JR Depo 111:21 through 112:7), 281).

On or about March 17, 2001, Respondent Ramsey submitted a letter to Wortham stating that the reason for Respondent City's protest of Petitioner's application was that Location B "appears to be in violation of the City Ordinance and State Law in that the location is within 1,000 feet of an educational institution, namely Terrell Christian Academy." (R 249: 1-2, 178 (MW Depo 31:21 through 32:6), 202-203 (MGR Depo 44:15 through 45:1), 207 (MGR Depo 63:24 through 64:5), 210 (MGR Depo 73:7 through 74:2), 238 (MGR Depo 183:13-15), 252).

On or about March 17, 2000, Wortham submitted a letter to Respondent Ramsey attempting to rebut the City's position regarding Terrell Christian Academy. In said letter, Wortham put Respondent Ramsey on notice that Petitioner had filed Cause No. 56540. (R 249: 178 (MW Depo 32:7-15), 179 (MW Depo 33:4-7; and 34:12-15), 253). Respondent Ramsey was not persuaded by Wortham's letter dated March 17, 2000. (R 249: 210 (MGR Depo 74:3-20)). Importantly, Respondent Rounsavall did not see this letter. (R 249: 111 (JR Depo 31:18 through 34:6)).

On or about March 21, 2000, Respondent Rounsavall submitted an affidavit to the TABC stating the reason for the City's protest of Petitioner's application for a Beer and

Wine Permit for Location B and explaining the factual circumstances related to the City's certification being issued in error on January 11, 2000. (R 249: 3-6, 118 (JR Depo 62:17-25; and 63:10-14), 256).

On or about March 21, 2000, Wortham sent Respondent Ramsey a letter outlining Petitioner's sales and the percentage of said sells which were derived from beer and wine sales. (R 249: 182 (MW Depo 47:6-9), 202 (MGR Depo 43:7-14), 213 (MGR Depo 87:7-15), 257). Importantly, Respondent Rounsavall did not see this letter. (R 249: 109 (JR Depo 26:8-20; 27:24 through 28:2), 127 (JR Depo 97:1-7)).

On or about March 23, 2000, Wortham submitted a letter to Respondent Ramsey outlining his position that Petitioner's application for a Beer and Wine Permit should be certified by Respondents. Importantly, Respondent Rounsavall did not see this letter. (R 249: 183 (MW Depo 51:1-14), 266).

In April 2000, the Rodriguezes obtained their Beer and Wine Permit for Location A. (R 249: 145 (HR Depo 13:8-9)). Respondent City, through Respondent Rounsavall, certified the Rodriguez' application because Respondents determined that Location A was "grandfathered" in to receiving said permit and certification. (R 249: 114 (JR Depo 48:20-23), 118 (JR Depo 64:18-25), 119 (JR Depo 67:4-7), 121 (JR Depo 73:1-25), 131 (JR Depo 115:16-20; and 116:7-13), 139 (JR Depo 145:14-16), 139 (JR Depo 146:3-21), 207 (MGR Depo 64:6-14), 225 (MGR Depo 132:7-11; 133:6-8; and 134:3-25), 229 (MGR Depo 149:2-11)).

On or about April 4, 2000, the Court issued an order granting Petitioner's nonsuit of Cause No. 56540. (R 249: 7-9, 32, 177 (MW Depo 27:20-22)).

On or about April 12, 2000, Respondent Rounsavall submitted a letter to the TABC outlining the reasons for the protest of Petitioner's application for a Beer and Wine

Permit. More specifically, Respondent Rounsavall explained that "the proposed establishment will be located within one thousand feet (1,000') of a public school or other educational institution located in a residential area." (R 249: 3-6, 101).

On or about May 2, 2000, Wortham submitted a letter to Respondent Ramsey once again outlining Petitioner's position that Respondent City should certify Petitioner's Beer and Wine Permit application. (R 249: 185 (MW Depo 58:9-19), 271). Again, Respondent Rounsavall did not see this letter. (R 249: 111 (JR Depo 33:6-17)).

On or about May 5, 2000, Petitioner filed an Original Petition for Writ of Mandamus, Cause No. 56794, seeking, *inter alia*, that the Court issue a writ of mandamus requiring Respondents City and Rounsavall to certify the Petitioner's application for a Beer and Wine Permit. (R 249: 7-9, 33-53, 177 (MW Depo 27:23 through 28:2)).

On or about June 15, 2000, counsel for Respondents, Mr. Jason Marshall, submitted a letter to the TABC articulating Respondents position that the TABC should grant Petitioner's application for a Beer and Wine Permit and that the TABC could not refuse to grant said application based on the City's failure to certify. (R 249: 7-9, 273).

On or about June 28, 2000, the Court dismissed Cause No. 56794 pursuant to Respondents' Plea to the Jurisdiction. (R 249: 7-9, 54).

On or about July 27, 2000, Respondent Rounsavall submitted a letter to the TABC withdrawing the City's protest of Petitioner's application for a Beer and Wine Permit. In said letter, Respondent Rounsavall explained that "[t]he applicant has provided information to the Attorney representing the City of Terrell in this case to certify that while the proposed premises will be within 1000 feet of a public school, based upon information provided by the Applicant, less than 50% of the gross

sales, excluding gasoline sales, will be from the sale of beer and wine, making the City's 1000 foot distance requirement inapplicable." (R 249: 3-6, 72 (JB Depo 71:3-6), 86 (JB Depo 125:20 through 126:7), 102, 121 (JR Depo 74:9-18), 122 (JR Depo 79:11-15), 130 (JR Depo 111:21 through 112:7), 277).

In August 2000, Petitioner obtained certification and a Beer and Wine Permit for Location B. (R 249: 60 (JB Depo 24:11-25), 71 (JB Depo 68:22-25), 86 (JB Depo 126:16-19)). Moreover, Petitioner obtained a renewal for his Beer and Wine Permit without delay. (R 249: 86 (JB Depo 128:17-21)).

Lawson never requested that Respondents City, Ramsey or Rounsavall delay the certification of Petitioner's application for a Beer and Wine Permit. (R 249: 1-6, 129 (JR Depo 106:18-25), 139 (JR Depo 146:3-21), 160 (GL Depo 37:4-9), 165 (GL Depo 57:15-25; 59:13-17; and 59:21 through 60:3), 166 (GL Depo 62:7-11), 204 (MGR Depo 52:6-8), 210 (MGR Depo 76:10-18), 229 (MGR Depo 149:2-11)).

### B. Disposition of Issue Below

Petitioner alleges that "[a]s a result of Respondents' actions, Petitioner has been deprived of the equal protection of the laws in violation of the Fourteenth Amendment of the United States Constitution." (R 136). Petitioner pursues a "class of one" equal protection claim. More specifically, Petitioner alleges that Respondents delayed the certification of his application for a Beer and Wine Permit while his neighbor at Location A, the tenant at 307 Ninth Street, obtained certification for a Beer and Wine Permit without delay. The Trial Court properly noted the inadequacy of the evidence proposed by Petitioner to support his inferences, and granted summary judgment. The United States Court of Appeals for the Fifth Circuit

affirmed the summary judgment granted by the Trial Court.

### C. Summary of the Argument

More specifically, Petitioner's claims were properly dismissed because: (a) Petitioner failed to demonstrate that Respondents had illegitimate animus or ill will toward Petitioner; (b) Petitioner failed to demonstrate that "illegitimate animus or ill-will" motivated Respondents' actions; (c) Petitioner failed to demonstrate that he was treated differently from others similarly situated with Petitioner; and (d) Petitioner failed to establish that a policy or custom of the City of Terrell deprived him of his equal protection rights under the Fourteenth Amendment. That is, Respondents' relevant actions were taken in an effort to determine whether selling beer and/or wine at Petitioner's new location of business would violate the City of Terrell's Charter or Ordinances. Moreover, Petitioner and the tenant at 307 Ninth Street were not similarly situated because Location A at 307 Ninth Street had received certification from the City of Terrell for a Beer and Wine Permit for many years and before the passing of Ordinance 1939 while Location B at 305 Ninth Street had not obtained the City of Terrell's certification. The Trial Court properly considered the evidence before it, even when viewed in a light most favorable to Petitioner; however, Petitioner failed to raise a genuine issue of material fact regarding his "class of one" equal protection claim.

## REASONS FOR DENYING THE PETITION

### A. The Circuits are not divided in their interpretation of *Village of Willowbrook* and whether animus or ill will is necessary to prosecute a "class of one" equal protection or selective enforcement claim.

Petitioner alleges that "[a]s a result of Respondents' actions, Petitioner has been deprived of the equal protection of the laws in violation of the Fourteenth Amendment of the United States Constitution." (R 136). Petitioner does not allege that he is a member of a protected class or group. Rather, Petitioner alleges a "class of one" equal protection claim. (R 124-144).

The United States Supreme Court has held that the Equal Protection Clause can give rise to a cause of action on behalf of a "class of one" even when the Petitioner does not allege membership in a protected class or group. *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 120 S.Ct. 1073, 1074-75, 145 L.Ed.2d 1060, 1063 (2000). Petitioner asserts that the United States Supreme Court does not require a showing of ill will and/or illegitimate animus to prove Petitioner's "class of one" equal protection claim. Notably, in *Shipp v. McMahon*, the Fifth Circuit extended the United States Supreme Court's holding and held that to establish a "class of one" equal protection claim, a single Petitioner must demonstrate that "an illegitimate animus or ill-will motivated his intentionally different treatment from others similarly situated and that no rational basis existed for such treatment." *Shipp v. McMahon*, 234 F.3d 907, 916 (5th Cir. 2000), *cert. denied* by 532 U.S. 1052 (2001). Notably, the United States Supreme Court denied the petition for writ of certiorari in *Shipp v. McMahon*. Accordingly, illegitimate animus or ill will is critical and its absence will defeat an equal protection challenge. *Shipp*, 234 F.3d at 916. Accordingly, the

Fifth Circuit properly ruled that "illegitimate animus or ill-will" is a necessary element of a "class of one" equal protection claim.

In *Village of Willowbrook, et al. v. Olech,* 528 U.S. 562 (2000), the Supreme Court was reviewing a decision to dismiss a lawsuit pursuant to Federal Rules of Civil Procedure 12(b)(6) for failure to state a cognizable claim under the Equal Protection Clause. The Supreme Court held that it was unnecessary to reach the alternative theory of "subjective at will" relied on by the Seventh Circuit Court of Appeals. *Id.* at 565. It did so because the Petitioner's complaint alleged that the Village's demand was "irrational and wholly arbitrary" as the Village ultimately connected her property after receiving a clearly adequate 15-foot easement when initially the Village intentionally demanded a 33-foot easement as a condition of connecting her property to the municipal water supply where the Village only required a 15-foot easement from other similarly situated property owners. *Id.* In *Olech,* the Supreme Court merely stands for the proposition that single Plaintiffs may bring equal protection claims. Therefore, the decision does not speak to or amend the requirement of an improper motive, such as illegitimate animus, for claims brought by the Petitioner. The *Olech* decision also held the alleged zoning decision was "irrational and wholly arbitrary," and therefore sufficient to state a claim for relief under traditional equal protection analysis. Because the TABC restriction at issue in the instant case is not "irrational and wholly arbitrary," Petitioners complaint is easily distinguished from the complaint at issue in *Olech.*

The Fourth Circuit, in *Greenspring Racquet Club, Inc. v. Baltimore County,* 232 F.3d 887, 2000 WL 1624496 (4th Cir. (Md.)) (unpublished opinion), is misquoted by the Petitioner. In *Greenspring*, the Fourth Circuit held that while "*Greenspring* is free to speculate about the hostility

that local officials directed towards them, in order to state an equal protection claim *Greenspring* also must demonstrate that there is no other legitimate purpose for the law. In other words, the Plaintiff in *Greenspring* must allege that malice and bad faith were the only conceivable basis for enacting a zoning law or zoning restriction, and this they cannot do." *Id.* at *6, quoting *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993).

Petitioner uses the unpublished opinion of *Greenspring* to persuade the United States Supreme Court into perceiving a conflict among the different Circuits in their interpretation of *Village of Willowbrook* and whether animus or ill will is necessary to prosecute a "class of one" equal protection or selective enforcement claim. As cited by *Greenspring* above, there is no conflict as the Fourth Circuit clearly indicated that the Plaintiff in *Greenspring* in its challenge to a zoning restriction by a legislative body must show and demonstrate bad faith and malice in order to sustain an equal protection claim.

As admitted by Petitioner, the Second Circuit and other Circuits cited by Petitioner are not split in their interpretation or application of *Olech*, specifically regarding whether subjective ill will is necessary for a "class of one" claim. *See* Petition, pp. 17-19. Specifically, Petitioner admits that even the Second Circuit is currently of the view that in order to make a "class of one" claim, the Plaintiff must prove either intentionally different treatment of similarly situated persons or subjective ill will. *See* Petition, p. 19. Since the Circuits are not divided in their interpretation of *Olech*, it would be unnecessary to ask the Supreme Court to expand or restrict its opinion in *Olech*.

Assuming *arguendo* that ill will or illegitimate animus is not required to prove a "class of one" equal protection claim, Petitioner's claim nevertheless fails because

Petitioner cannot prove that he was intentionally treated differently from others similarly situated and that no rational basis existed for such treated. These issues will be discussed below.

## B. The Court of Appeals properly concluded that Respondents' actions were not motivated by illegitimate animus or ill will.

Petitioner alleges that "Petitioner's change of locations angered his former landlord, who vowed to take whatever actions were necessary to prevent Petitioner from obtaining the permit. The Respondents' intent to drive Petitioner out of business and their actions described [in Petitioner's Second Amended Complaint] resulted at least in part from the requests of the landlord and his ill will and illegitimate animus toward Petitioner." (R 135). In essence, Petitioner argues that because his former landlord was angry with him, Respondents were angry with him too and Respondents acted on that anger. Notably, Petitioner admits that said allegations are merely his assumptions. (R 249: 81 (JB Depo 105:18 through 107:10), 81-82 (JB Depo 108:22 through 110:16)).

In fact, the evidence shows that prior to the events made the subject of the case at bar, Petitioner had never met Respondents Rounsavall or Ramsey. (R 249: 58 (JB Depo 13:7-13; and 13:24-25)). It is unclear how Respondents Rounsavall and Ramsey could have had ill will toward someone they had not even met. Moreover, after January 2000, Petitioner only met with Respondent Rounsavall on three (3) occasions and with Respondent Ramsey on one (1) occasion at which times his discussions with them related to the situation at hand. (R 249: 58 (JB Depo 14:16 through 15:9), 58-59 (JB Depo 16:1 through 17:1), 69 (JB Depo 60:9-22)., 70-71 (JB Depo 62:23 through

68:8), 76 (JB Depo 86:22 through 87:6), 77 (JB Depo 90:9-13)). Petitioner provided no evidence demonstrating that Respondents Rounsavall and Ramsey developed illegitimate animus or ill will based on these meetings or for any other reason; Petitioner alleges that it is his belief that Respondents had illegitimate animus or ill will toward him. (R 249: 82-84 (JB Depo 110:17 through 118:15; and 119:4 through 120:12), 85 (JB Depo 121:2-10; and 124:6 through 125:2)). Petitioner's subjective beliefs alone cannot be the basis for judicial relief. *Cf. Montgomery v. Trinity Indep. Sch. Dist.*, 809 F.2d 1058, 1062 (5th Cir. 1987) (explaining that the simple fact that the Petitioner believes he was the victim of discrimination is not enough for judicial relief). Finally, the record demonstrates that Petitioner's former landlord never requested that Respondents delay the certification of Petitioner's Beer and Wine Permit. (R 249: 1-6, 129 (JR Depo 106:18-25), 139 (JR Depo 146:3-21), 160 (GL Depo 37:4-9), 165 (GL Depo 57:15-25; 59:13-17; and 59:21 through 60:3), 166 (GL Depo 62:7-11), 204 (MGR Depo 52:6-8), 210 (MGR Depo 76:10-18), 229 (MGR Depo 149:2-11)).

Assuming *arguendo* that the Court finds that Respondents had illegitimate animus or ill will toward Petitioner, Petitioner's claim nevertheless fails. More specifically, the "class of one" equal protection cases at bar have been deemed "vindictive action" cases and the courts have held that such cases require proof that "the cause of the differential treatment is a totally illegitimate animus toward the Plaintiff by the Defendant." *Albiero v. City of Kankakee*, 246 F.3d 927, 932 (7th Cir. 2001) (emphasis added) (internal quotations omitted); *Shipp*, 234 F.3d at 916. Thus, "[i]f the Respondent would have taken the complained-of action anyway, even if it didn't have the animus, the animus would not condemn the action. Ill will must be the sole cause of the complained-of action. A showing of uneven law enforcement, standing alone, will

not suffice." *Albiero*, 246 F.3d at 932 (internal quotations omitted).

Petitioner failed to provide any evidence demonstrating that illegitimate animus or ill will caused or motivated Respondents' actions. In fact, the evidence demonstrates that Respondents' actions were motivated by a desire to determine whether selling beer and wine out of Petitioner's new location of business, Location B, would violate the City of Terrell's ordinances and/or state law. More specifically, the City of Terrell's duty, through Respondent Rounsavall its City Secretary, with regard to a Beer and Wine Permit application is to certify "whether the location or address given in the application is in a wet area, and whether the sale of alcoholic beverages for which the permit is sought is prohibited by charter or ordinance." *See* TEX. ALCO. BEV. CODE § 11.37; (R 249: 3-6, 110 (JR Depo 31:7-12), 111 (JR Depo 35:12-23; and 36:1-13)). On or about January 11, 2000, Respondent Rounsavall certified Petitioner's application for a Beer and Wine Permit for 305 Ninth Street ("Location B") in error. (R 249: 3-6, 69 (JB Depo 57:9 through 58:4), 114 (JR Depo 47:18-21), 115 (JR Depo 51:9 through 54:18), 119 (JR Depo 68:5-25), 120 (JR Depo 69:1-10), 218 (MGR Depo 105:5-9)). After learning of this error, Respondent Rounsavall, with the advice of Respondent Ramsey, took the necessary actions to protest Petitioner's Beer and Wine Permit application pending a determination of whether selling beer and wine out of Location B would be in violation of the City of Terrell's ordinances. (R 249: 3-6, 77 (JB Depo 91:6-13), 116 (JR Depo 55:8-15; and 55:24-25), 117 (JR Depo 58:9-12), 124 (JR Depo 86:11-13; and 87:12-19), 132 (JR Depo 119:8-16), 206 (MGR Depo 59:20-23)). Respondent Rounsavall took these actions because no one had ever sold beer and wine from Location B and because Respondent Rounsavall was under the impression that one could not sell beer and wine from Location B. Thus, Petitioner's application for a Beer

and Wine Permit for Location B was equivalent to a new application.

The ordinance at issue in the year 2000, Ordinance 1939, provides that "[i]t shall be unlawful for any person to sell or engage in the business of selling alcoholic beverages within the City where the place of business is within 300 feet of any church, public hospital or within 1,000 feet of public schools or other educational institutions." (R 249: 286) (emphasis added). Petitioner's new location of business, Location B, was within: (a) 700 feet of Children's Depot Learning Center; (b) 580 feet of Our Kid's Tree House Child Care; (c) 740 feet of Terrell Christian Academy; and (d) 600 feet of a Terrell Independent School District baseball facility. (R 249: 3-6, 130 (JR Depo 111:21 through 112:7), 281). Clearly, the ordinance at issue applied. Thus, the evidence demonstrates Respondents' actions in delaying the certification of Petitioner's were motivated by Ordinance 1939 and its application to Petitioner's new location of business, Location B. After making a determination that Petitioner was exempted from the application of Ordinance 1939, Respondent Rounsavall certified Petitioner's application on July 27, 2000. (R 249: 3-6, 72 (JB Depo 71:3-6), 86 (JB Depo 125:20 through 126:7), 102, 121 (JR Depo 74:9-18), 122 (JR Depo 79:11-15), 130 (JR Depo 111:21 through 112:7), 277). Petitioner failed to provide any evidence demonstrating that if his former landlord and/or Respondents were not allegedly angry with him, Respondents would not have taken the requisite actions to determine if selling beer and wine from Location B would violate the City of Terrell's ordinances.

Furthermore, in support of his position that ill will and/or illegitimate animus motivated Respondents' action, Petitioner emphasizes that "the City opposed Petitioner only after being approached by Lawson. Rounsavall's story regarding the change of address is implausible." *See*

Petition, p. 21(6). The evidence demonstrates that some time between January 12, 2000 and February 23, 2000, Lawson came in to check with Respondent Rounsavall and Respondent Ramsey as to why Respondent City had certified Petitioner's Beer and Wine Permit considering Petitioner had relocated to Location B. (R 249: 3-6, 109 (JR Depo 28:3-25), 110 (JR Depo 29:6 through 31:1), 115 (JR Depo 51:9-25), 125 (JR Depo 91:16-18), 158 (GL Depo 31:17 through 32:25), 159 (GL Depo 33:4-16), 160 (GL Depo 40:22-25), 208 (MGR Depo 65:12-21), 232 (MGR Depo 162:7-25), 233 (MGR Depo 163:1-6)). Thereafter, Respondent Rounsavall determined that Petitioner's beer and wine permit application was for a new location, as opposed to a new number being assigned to an old building, and that the permit issued to Petitioner had been issued in error. Respondent Rounsavall then sought to determine whether issuing a beer and wine permit to Location B would violate any city ordinances. Specifically, the record demonstrates that: (1) on February 23, 2000, Respondent Rounsavall submitted an e-mail message to Respondent Ramsey explaining that Petitioner's application "came through as an address change only"; and (2) on March 21, 2000, Respondent Rounsavall signed an affidavit stating "[t]he application for the business came in as a change of address. I was not told it was a change in physical location of the business. It was approved in error upon learning of the location change, the protest was filed." (R 249: 41, 256, 278). Accordingly, the evidence demonstrates what truly motivated Respondents' actions.

Petitioner accentuates that Lawson made numerous statements regarding the fact that he was going to fight Petitioner over the permit, that Lawson attended each hearing involving Petitioner, and that Lawson disliked Petitioner. *See* Petition, pp. 2, 15, and 21(8). Assuming *arguendo* that Lawson disliked Petitioner, Petitioner failed to provide competent summary judgment evidence that

Lawson's ill will or illegitimate animus toward Petitioner was adopted by Respondents. In fact, the only evidence provided by Petitioner that Respondents possessed ill will or illegitimate animus toward Petitioner is an affidavit from Petitioner's attorney, Mr. Michael Wortham, stating that he "believe[s] that [Ramsey] opposed the permit in an effort to aid and/or appeals Lawson and because she simply wanted to do so, regardless of the circumstances or who she affected." (R 297: 26) This is hardly sufficient to establish that Respondent Ramsey and/or Respondents had ill will or illegitimate animus toward Petitioner. Petitioner's and/or Petitioner's counsel's subjective belief that Respondents had ill will or illegitimate animus toward Petitioner is insufficient to overcome summary judgment. *Cf. Swanson v. General Services Administration*, 110 F.3d 1180, 1189 (5th Cir. 1997); *Montgomery v. Trinity Indep. Sch. Dist.*, 809 F.2d 1058, 1062 (5th Cir. 1987).

Next, Petitioner argues that instead of following TABC procedures and protesting the application based upon a valid statute or ordinance, Respondents called the local TABC agent and asked him to hold the application without notification to Petitioner. *See* Petition, pp. 4, 21(3). Importantly, Petitioner fails to identify what TABC procedures were violated and/or not followed. Nevertheless, as the record demonstrates, this was not a standard approval/denial process for Respondent Rounsavall and/or Respondent City. Specifically, the record reflects that Respondent Rounsavall had initially approved the Beer and Wine permit for Location B and that after learning of physical change in buildings that Respondent Rounsavall determined that the Beer and Wine Permit had been issued in error. Assuming *arguendo* that Respondents failed to follow proper TABC procedure, this is not sufficient evidence that ill will or illegitimate animus motivated Respondents' actions. Furthermore, Petitioner

alleges that Respondents secretly requested Maloney to "hold" Petitioner's application. *See* Petition, p. 21(3). This position is based on hearsay and is unsupported by the competent summary judgment evidence. More specifically, on or about March 14, 2000, Respondent Rounsavall notified Petitioner that he was protesting Petitioner's Location B Beer and Wine Permit application. (R 249: 3-6, 118 (JR Depo 62:3-6), 251). Accordingly, there was no conspiracy to "secretly" hold Petitioner's application. Moreover, even if Respondents had asked Maloney to "hold" the permit without Petitioner's knowledge, this does not demonstrate that Respondents did so out of spite or ill will toward Petitioner.

Furthermore, in an attempt to overcome summary judgment, Petitioner argues that the "grandfather clause" did not apply because the Rodriguezes did not purchase Petitioner's business and/or did not purchase Lawson's building. *See* Petition, p. 23. Assuming *arguendo* that when Petitioner moved out of Location A and the Rodriquezes moved into and leased Location A that said action would not constitute a "transfer" of business and/or premises as stated in the statute, the evidence demonstrates that the "grandfather clause" motivated Respondents' actions regarding the issuance of a Beer and Wine Permit for Location A. (R 249: 3-6, 114 (JR Depo 48:20-23), 118 (JR Depo 64:18-25), 119 (JR Depo 67:4-7), 121 (JR Depo 73:1-25), 131 (JR Depo 115:16-20; and 116:7-13), 139 (JR Depo 145:14-16), 139 (JR Depo 146:3-21), 207 (MGR Depo 64:6-14), 225 (MGR Depo 132:7-11; 133:6-8 and 134:3-5), 229 (MGR Depo 149:2-11)). If in fact Respondents incorrectly interpreted said statute and/or mistakenly applied the "grandfather clause," "even an incorrect belief . . . constitutes a legitimate . . . reason. [The courts] do not try . . . the validity of good faith beliefs . . . Motive is the issue." *Cf. Little v. Republic Refining Co. Ltd.*, 924 F.2d 93, 96 (5th Cir. 1991).

Petitioner further asserts that Respondent Ramsey adopted a variety of meritless positions to support the City's protest of Petitioner's application. *See* Petition, pp. 20(1), 21(2). Nevertheless, Petitioner fails to provide evidence demonstrating that was the case. In fact, Petitioner admits that the only time he met with Respondent Ramsey she indicated that the ball field and day care may be the problem with Location B and that he assumed that was her position. (R 249: 70-71 (JB Depo 62:23 through 67:6), 76 (JB Depo 88:16-20)). Petitioner admits that Respondent Ramsey never made any specific statements regarding the City's position. (R 249: 74 (JB Depo 80:11-15; and 80:23 through 81:7)). In addition, Petitioner admits that he assumed that Respondent Ramsey was relying on Section 2(D). (R 249: 78 (JB Depo 95:23 through 96:8)). Moreover, Respondent Ramsey testified that the only official position regarding the issuance of a Beer and Wine Permit to Location B was the position reflected in her March 17, 2000 correspondence to Wortham regarding Terrell Christian Academy. (R 249: 202 (MGR Depo 41:18-22), 202-203 (MGR Depo 44:15 through 45:1), 203 (MGR Depo 47:1 through 48:5), 207 (MGR Depo 63:24 through 64:5), 210 (MGR Depo 73:7 through 74:20), 219 (MGR Depo 110:15-22), 237 (MGR Depo 181:3-7), 238 (MGR Depo 183:13-15), 239 (MGR Depo 188:2-8), 241 (MGR Depo 198:2-24), 252). Notwithstanding, assuming for purposes of argument that Respondent Ramsey began asserting other and/or another ordinance as the basis for protesting Petitioner's Location B application for a Beer and Wine Permit, this does not demonstrate that Respondent Ramsey and/or Respondents had ill will or illegitimate animus toward Petitioner. In fact, all that would demonstrate is that a complete legal analysis was being made regarding Location B.

Petitioner also alleges that the following additional "circumstantial evidence" supports that an illegitimate

animus or ill will motivated Respondents: (1) Respondent Ramsey would not take Wortham's calls and gave excuses to avoid dealing with the case; (2) once Jason Marshall began representing the C[illegible]he City began looking for a manner in which Petitioner could be granted the license while "the City saved face"; (3) Respondents knew Petitioner would be in serious financial trouble without the permit; (4) Petitioner was from Missouri and lived in Dallas while Lawson lived in Terrell and has known Ramsey for most of his life; (5) Ramsey responded to Mallard but not to Wortham; (6) a copy of Rounsavall's April 12 letter to the TABC was not provided to Petitioner until after the litigation began; (7) the same ordinances and statutes should have been applied uniformly to Beeler in Location B and Lawson's tenant in Location A; (8) Respondents used the "grandfather clause" position to help Lawson's tenant get a permit; and (9) the City recognized state laws when convenient and did not recognize state laws when convenient. *See* Petition, pp. 21(4), (5), (9)-(11), 22(12)-(15). Said "circumstantial evidence" amounts to improbable inferences and unsupported speculation. Furthermore, said evidence is not competent summary judgment evidence and does not support Petitioner's "class of one" equal protection claim; therefore, Petitioner failed to demonstrate a genuine issue of material fact regarding his claim.

Petitioner further argues that because information regarding the percentage of beer and wine sales from Location A was provided to Respondent Ramsey on March 21, 2000, the fact that Respondents did not certify Petitioner's application until July 27, 2000 proves Respondents acted with ill will and/or illegitimate animus. *See* Petition, pp. 10 and 21(7). Notably, Respondent Rounsavall was not provided with this information. (R 249: 109 (JR Depo 26:8-20; 27:24 through 28:2), 127 (JR Depo 97:1-7)). Moreover, the record demonstrates that between March

15, 2000 and June 2000, Petitioner had filed two lawsuits regarding the matters at issue. (R 249: 7-31, 33-53, 177 (MW Depo 27:23 through 28:2)). Therefore, litigation was pending during this time frame and the City was attempting to get the TABC to act without the City's certification. (R 249: 7-9, 273). As noted above, the City's certification was being withheld based on Ordinance 1939 which clearly applied to the circumstances at bar. Accordingly, contrary to Petitioner's assertion, said evidence is insufficient to demonstrate ill will or illegitimate animus on the part of Respondents.

Moreover, Petitioner asserts that in 1998 (without identifying a specific date), Respondent Rounsavall told a third party with the TABC, Winston Smith, that certification for a Beer and Wine Permit for Location B would not violate any City ordinance. *See* Petition, p. 3. Assuming this hearsay evidence is true, Ordinance 1939 did not become effective until October 1998. Ordinance 1345, the predecessor to Ordinance 1939, only prohibited the selling of beer and wine where the place of business was within three hundred (300) feet of any other educational institution. (R 249: 284). Terrell Christian Academy was not within 300 feet of Location B; therefore, Respondent Rounsavall would have been correct in early 1998. Thus, this "evidence" does not demonstrate ill will or illegitimate animus toward Petitioner.

Finally, Respondents did have a rational basis for their actions relative to Petitioner. Namely, Ordinance 1939 provides that "[i]t shall be unlawful for any person to sell or engage in the business of selling alcoholic beverages within the City where the place of business is within 300 feet of any church, public hospital or within 1,000 feet of public schools or other educational institutions." (R 249: 286) (emphasis added). Petitioner's new location of business, Location B, was within 740 feet of Terrell Christian Academy, a private educational institution. (R 249: 3-6,

130 (JR Depo 111:21 through 112:7), 281). Clearly, Ordinance 1939 applied to Petitioner's new location of business. Moreover, the evidence demonstrates that Respondents City and Rounsavall certified the Rodriguez' application for Location A based on the "grandfather clause." (R 249: 3-6, 114 (JR Depo 48:20-23), 118 (JR Depo 64:18-25), 119 (JR Depo 67:4-7), 121 (JR Depo 73:1-25), 131 (JR Depo 115:16-20; and 116:7-13), 139 (JR Depo 145:14-16), 139 (JR Depo 146:3-21), 207 (MGR Depo 64:6-14), 225 (MGR Depo 132:7-11; 133:6-8 and 134:3-5), 229 (MGR Depo 149:2-11)). Therefore, Respondents had a rational basis for their actions.

### C. The Court of Appeals properly concluded that Petitioner and his neighbor were not "similarly situated."

Petitioner alleges that Respondents delayed the certification of his application for a Beer and Wine Permit ("Beer and Wine Permit") for Location B while his neighbor, the tenant at Location A, obtained certification from Respondents without delay. The tenants at Location A received their Beer and Wine Permit in April 2000. (R 249: 145 (HR Depo 13:8-9)). Petitioner received his Beer and Wine Permit for Location B in August 2000. (R 249: 60 (JB Depo 24:11-25), 71 (JB Depo 68:22-25), 86 (JB Depo 126:16-19)). There is no dispute that Petitioner's former location of business and his new location of business were immediately next door to each other. Notwithstanding, Petitioner, doing business out of Location B, was not similarly situated as the tenants doing business out of Location A. For Petitioner's equal protection claim to be successful, Petitioner must demonstrate that "the government is treating unequally those individuals who are prima facie identical in all relevant respects." *Albiero*, 246 F.3d at 932. As discussed below, Petitioner failed to produce

evidence showing that he was intentionally treated differently than others "similarly situated."

Specifically, a Beer and Wine Permit had been granted for Location A prior to the passing of Ordinance 1939. (R 249: 57, 114 (JR Depo 45:8-12; and 47:3-19), (JB Depo 11:24 through 12:2), 153 (GL Depo 11:25 through 12:10), 207 (MGR Depo 64:6-14)). Moreover, when Petitioner began the operation of his business out of Location A in 1990, the previous business owners possessed a Beer and Wine Permit; had been certified by the City to sell beer and wine from Location A; and were selling beer and wine from Location A. (R 249: 57, 114 (JR Depo 45:8-12; and 47:3-19), (JB Depo 11:24 through 12:2), 153 (GL Depo 11:25 through 12:10), 207 (MGR Depo 64:6-14)). Petitioner continued to sell beer and wine from Location A until approximately March 15, 2000. (R 249: 62 (JB Depo 32:6-10), 64 (JB Depo 39:14-22), 164 (GL Depo 56:14-24)). Thus, Petitioner had a valid Beer and Wine Permit for Location A until March 15, 2000 when he moved out and the new tenants moved into Location A. (R 249: 62 (JB Depo 32:6-10), 64 (JB Depo 39:14-22), 164 (GL Depo 56:14-24)).

The Texas Alcoholic Beverage Code provides "[i]f at the time an original alcoholic beverage permit or license is granted for a premises the premises satisfied the requirement regarding distance from schools, churches and other types of premises established in this code and any other law or ordinance of the state or a political subdivision of this state in effect at that time, the premises shall be deemed to satisfy the distance requirements for all subsequent renewals of the license or permit." *See* TEX. ALCO. BEV. CODE § 109.59(a). Moreover, the code provides "[o]n the sale or **transfer of the premises** or the business on the premises **in which a new original license or permit is required** for the premises, the **premises shall be deemed** to satisfy any distance requirements as if the issuance of the new original permit or license were a

**renewal of a previously held permit or license.**" *See* TEX. ALCO. BEV. CODE § 109.59(b) (emphasis added). Accordingly, when the Rodriguezes "transferred" into Location A (when Petitioner moved out) and applied for a Beer and Wine Permit for Location A, Location A was to be deemed to satisfy any distance requirement as if the Rodriguez' application was the renewal of a previously held permit or license. Thus, because Location A had been granted a Beer and Wine Permit for many years and had satisfied the distance requirements for many years, the Rodriguez' application satisfied the relevant distance requirements. In essence, Location A was grandfathered to receiving a Beer and Wine Permit and certification from the City. Respondents City and Rounsavall certified the Rodriguez' application for Location A based on the "grandfather clause." (R 249: 3-6, 114 (JR Depo 48:20-23), 118 (JR Depo 64:18-25), 119 (JR Depo 67:4-7), 121 (JR Depo 73:1-25), 131 (JR Depo 115:16-20; and 116:7-13), 139 (JR Depo 145:14-16), 139 (JR Depo 146:3-21), 207 (MGR Depo 64:6-14), 225 (MGR Depo 132:7-11; 133:6-8 and 134:3-5), 229 (MGR Depo 149:2-11)).

On the other hand, no one had ever sold beer and/or wine from Location B before or after the passing of Ordinance 1939 in October of 1998. (R 249: 77 (JB Depo 91:6-13), 154 (GL Depo 15:23 through 16:12), 208 (MGR Depo 67:6-13)). After Petitioner obtained his permit in August 2000, Petitioner was the first person to ever sell beer and/or wine from Location B. (R 249: 77 (JB Depo 91:6-13), 154 (GL Depo 15:23 through 16:12), 208 (MGR Depo 67:6-13)). Thus, the "grandfather clause" discussed above was clearly not applicable. As noted above, Petitioner's new location of business, Location B, is within: (a) 700 feet of Children's Depot Learning Center; (b) 580 feet of Our Kid's Tree House Child Care; (c) 740 feet of Terrell Christian Academy; and (d) 600 feet of a Terrell Independent School District baseball facility. (R 249: 3-6, 130 (JR Depo 111:21

through 112:7), 281). Clearly, Ordinance 1939 applied. After making a determination that Petitioner was exempted from the application of Ordinance 1939, Respondent Rounsavall certified Petitioner's application on July 27, 2000. (R 249: 3-6, 72 (JB Depo 71:3-6), 86 (JB Depo 125:20 through 126:7), 102, 121 (JR Depo 74:9-18), 122 (JR Depo 79:11-15), 130 (JR Depo 111:21 through 112:7), 277). The evidence demonstrates that Respondents did not treat Petitioner differently than similarly situated individuals. That is, Location A had an entirely different "beer-and-wine-selling" history than Location B. First, Location A had been issued a Beer and Wine Permit before the passing of Ordinance 1939 and had sold beer and wine for many years. That was not the case for Location B. (R 249: 139 (JR Depo 146:3-21)). Therefore, Petitioner and the Rodriguezes were not clearly identical in all relevant respects. The differences between their "beer-and-wine-selling" history made the difference on how Respondents and state law treated the two locations. More specifically, because of the different history, the "grandfather clause" outlined above applied to Location A while it did not apply to Location B.

Finally, Petitioner contends that the "grandfather clause" at issue does not apply to the tenants at Location A. Petitioner attempts to interpret the term "transfer" in the statute at issue. Using Petitioner's logic, Petitioner's Beer and Wine Permit would have belonged to Lawson. Notwithstanding, whether Petitioner's interpretation or Respondents' interpretation is correct, the bottom line is that Respondents applied the "grandfather clause" to the tenants at Location A; therefore, Petitioner and his neighbor were not similarly situated. (R 249: 114 (JR Depo 48:20-23), 118 (JR Depo 64:18-25), 119 (JR Depo 67:4-7), 121 (JR Depo 73:1-25), 131 (JR Depo 115:16-20; and 116:7-13), 139 (JR Depo 145:14-16), 139 (JR Depo 146:3-21), 207

(MGR Depo 64:6-14), 225 (MGR Depo 132:7-11; 133:6-8; and 134:3-25), 229 (MGR Depo 149:2-11)).

For the reasons discussed above, the Fifth Circuit Court of Appeals properly concluded that Petitioner and his neighbor were not "similarly situated."

## CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Respondents John Rounsavall, Mary Gayle Ramsey and the City of Terrell, Texas respectfully request that the Supreme Court of the United States deny the Petition for Writ of Certiorari, and for such other relief that they may show themselves justly entitled.

Respectfully submitted,

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